This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

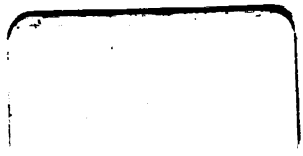
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`



CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES

FOR THE

SEVENTH JUDICIAL CIRCUIT.

BY

JOSIAH H. BISSELL,
OF THE CHICAGO BAR,
OFFICIAL REPORTER.

VOL. XI.—1882, 1883.

CHICAGO:
CALLAGHAN AND COMPANY.
1883.

Entered according to Act of Congress, in the year 1883,
By CALLAGHAN & CO.,
In the Office of the Librarian of Congress at Washington, D. C.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

N. B. Barlow, Printer, Chicago.

JUDGES,

SITTING IN THE SEVENTH CIRCUIT DURING THE PERIOD COVERED BY THIS VOLUME.

HON. JOHN M. HARLAN,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.
Allotted to the Seventh Circuit. Appointed November 29, 1877.

HON. THOMAS DRUMMOND,
CIRCUIT JUDGE FOR THE SEVENTH CIRCUIT.
Appointed December 22, 1869. District Judge since February 19, 1850.

HON. SAMUEL H. TREAT,
DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF ILLINOIS.
Appointed March 3, 1855.

HON. WALTER Q. GRESHAM,
DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.
Appointed December 21, 1869. Resigned, and appointed Postmaster General April 11, 1883.

HON. HENRY W. BLODGETT,
DISTRICT JUDGE FOR THE NORTHERN DISTRICT OF ILLINOIS.
Appointed January 11, 1870.

HON. CHARLES E. DYER,
DISTRICT JUDGE FOR THE EASTERN DISTRICT OF WISCONSIN.
Appointed February 10, 1875.

HON. ROMANZO BUNN,
DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WISCONSIN.
Appointed October 13, 1877.

HON. WILLIAM A. WOODS,
DISTRICT JUDGE FOR THE DISTRICT OF INDIANA.
Appointed May 2, 1883.

32044

TABLE OF CASES.

A.

Adams *ads.* Southworth.....256
Aldridge *vs.* Crouch.....180
American Oleograph Company *ads.* Kerting..... 81
Artt *ads.* Osgood.....160
Atchison *vs.* Morris.....191

B.

Bates *vs.* United States..... 70
Baxter *vs.* Hartford Fire Insurance Co.....306
Beecher *vs.* Chicago and Northwestern R'y Co.....246
Belford *ads.* Clemens.....459
Bjornstad, Jorgen, *In re*..... 68
Blair *vs.* Chicago and Pacific R. R. Co.....320
Bookwalter *vs.* Clark.....126
Boulton *vs.* Moore.....500
Buckeye, The..... 92

C.

Cameron *ads.* Goss.....389
Chicago and Northwestern R'y Co. *ads.* Beecher.....246
Chicago and Pacific R. R. Co. *ads.* Blair.....320
Chicago, Burlington and Quincy R. R. Co. *ads.* State of Illinois.....584
Chicago, City of, *ads.* Mutual Union Telegraph Co.....539

Same *vs.* Hutchinson.....484
Chicago Electric Light Manufacturing Co. *ads.* Western Electric Light Co.....427
Chicago Theological Seminary *vs.* Gage.....289
City of Chicago *ads.* Mutual Union Telegraph Co.....539
Same *vs.* Hutchinson.....484
City of Indianapolis *ads.* Kennedy..... 13
City of Janesville *ads.* Porter..... 64
Clark *ads.* Bookwalter.....126
Clemens *vs.* Belford.....459
Commercial Union Assurance Co. *ads.* Stout.....309
Cotzhausen *ads.* Kerting.....582
Cotzhausen *vs.* Nazro..... 44
Craft *ads.* Smith.....340
Crandall *vs.* Goodrich Transportation Co.....516
Crouch *ads.* Aldridge.....180

D.

Davis *vs.* Niagara Fire Insurance Co.....165
Deakin *ads.* Lea..... 23
Same *ads.* Same..... 40
Same *vs.* Same..... 27
Same *vs.* Same..... 34
De Land *ads.* Hubbell.....382
Dice *ads.* Union Mutual Life Insurance Co.....373
Dole, The Louie.....479
Doyle *vs.* United States.....100

E.

Edwards *vs.* Wray.....251
Ellis *vs.* Sisson.....187
Evans *vs.* Faxon.....175

F.

Farmers' Loan and Trust Co. *vs.* Green Bay and Minnesota R. R. Co. 334
Favorite, The 283
Faxon *ads.* Evans 175
Fay & Co., J. A. *vs.* Fraser 422
Feather Duster Company *vs.* Hibbard 76
Finney *vs.* Grand Trunk R'y Co. 370
Fiske *vs.* Hills 294
Foote *ads.* Jackson 223
Ford *vs.* Kurtz 324
Foreman *ads.* Price 328
Forsythe *vs.* Pierson 133
Forsythe *vs.* Van Winkle 108
Fraser *ads.* J. A. Fay & Co. 422
Furst & Bradley Manufacturing Co. *ads.* Newton 405

G.

Gage *ads.* Chicago Theological Seminary 289
Same *ads.* Smith 217
Gaylord *ads.* United States 438
Geraghty *ads.* Ireland 465
Godfrey *ads.* Leopold 158
Goodrich Transportation Co. *ads.* Crandall 516
Goss *vs.* Cameron 389
Glover *ads.* Huse 550
Glover *vs.* Shepperd 572
Grand Trunk R'y Co. *ads.* Finney 370
Green Bay and Minnesota R. R. Co. *ads.* Farmers' Loan and Trust Co. 334

H.

Hamilton *ads.* United States..... 85
Hancock *vs.* Toledo, Peoria and Warsaw R. R. Co.....148
Hanover Fire Insurance Co. *ads.* Johnson.....452
Hapgood *vs.* Hewitt.....184
Hartford Fire Insurance Co. *ads.* Baxter.....306
Harvey *vs.* Lord.....144
Hatch *vs.* Indianapolis and Springfield R. R. Co.....138
Hawks *ads.* Thompson.....440
Hazelton *vs.* Manhattan Fire Insurance Co.....210
Hewitt *ads.* Hapgood.....184
Hibbard *ads.* National Feather Duster Company..... 76
Higgie *vs.* National Lloyds.....395
Hills *ads.* Fiske.....294
Hubbell *vs.* De Land.....382
Huse *vs.* Glover.....550
Hutchinson *ads.* City of Chicago.....484
Same *ads.* Putnam.....233
Same *ads.* Same.....240
Hyderabad, The.....112

I.

Illinois, State of, *vs.* Chicago, Burlington and Quincy R. R. Co.....584
Indianapolis and Springfield R. R. Co. *ads.* Hatch.....138
Indianapolis, City of, *ads.* Kennedy..... 13
Indiana, State of, *ex rel. vs.* Pullman Palace Car Co....561
Indiana, State of, *vs.* Milk.....197
In re Jorgen Bjornstad..... 68
In re State Insurance Co.....301
Ireland *vs.* Geraghty.....465
Irvine *ads.* McKay.....168

Irwin *ads.* Williar..... 57

J.

Jackson *vs.* Foote.....223
Janesville, City of, *ads.* Porter..... 64
Johnson *vs.* Hanover Fire Insurance Co.....452

K.

Kellar *ads.* United States.....314
Kennedy *vs.* City of Indianapolis..... 13
Kerting *vs.* American Oleograph Co..... 81
Same *vs.* Cotzhausen.....582
King *vs.* Ohio and Mississippi R'y Co.....362
Knowlton *ads.* Ray.....360
Kurtz *ads.* Ford.....324

L.

Lea *ads.* Deakin..... 27
Same *ads.* Same..... 34
Same *vs.* Same..... 23
Same *vs.* Same..... 40
Leopold *vs.* Godfrey.....158
Lloyds *ads.* Higgie.....395
Lord *ads.* Harvey.....144
Louie Dole, The.....479

M.

Manhattan Fire Insurance Co. *ads.* Hazelton.....210
McClellan *vs.* Whiteley.....444
McKay *vs.* Irvine.....168
Metropolitan Grain and Stock Exchange *vs.* Mutual Union Telegraph Co.....531
Milk *ads.* State of Indiana.....197

Mitchell *vs.* Tillotson.....325
Moore *ads.* Boulton.....500
Morris *ads.* Atchison.....191
Murphy *ads.* United States.....415
Mutual Union Telegraph Co. *ads.* Metropolitan Grain and Stock Exchange.....531
Mutual Union Telegraph Co. *vs.* City of Chicago.....539

N.

National Feather Duster Co. *vs.* Hibbard..... 76
National Lloyds *ads.* Higgie.....395
Nazro *ads.* Cotzhausen..... 44
Newton *vs.* Furst & Bradley Manufacturing Co.....405
Niagara Fire Insurance Co. *ads.* Davis.....165
Northern Illinois Coal and Iron Co. *vs.* Young.....331

O.

Ohio and Mississippi R'y Co. *ads.* King.....362
Osgood *vs.* Artt.....160

P.

People of the State of Illinois *vs.* Chicago, Burlington and Quincy R. R. Co.....584
Peterson *ads.* Thorson.....497
Phœnix Mutual Life Insurance Co. *vs.* Walrath.....432
Pierson *ads.* Forsythe.....133
Porter *vs.* City of Janesville..... 64
Price *vs.* Foreman.....328
Public Grain and Stock Exchange *vs.* Western Union Telegraph Co.....568
Pullman Palace Car Co. *ads.* State of Indiana *ex rel.*....561
Putnam *vs.* Hutchinson.....233
Same *vs.* Same.....240

R.

Ralph *vs.* United States..... 88
Ray *vs.* Knowlton.....360

S.

Shepperd *ads.* Glover.....572
Singer Manufacturing Co. *ads.* Wilson.....298
Singer Rocking Chair Co. *vs.* Toby Furniture Co.....353
Sisson *ads.* Ellis.....187
Smith *vs.* Craft.....340
Smith *vs.* Gage.....217
Southworth *vs.* Adams.....256
Sprague *ads.* United States.....376
State Insurance Co., *In re*.....301
State of Illinois *vs.* Chicago, Burlington and Quincy R. R. Co.....584
State of Indiana *ex rel. vs.* Pullman Palace Car Co.....561
State of Indiana *vs.* Milk.....197
Stout *vs.* Commercial Union Assurance Co.....309

T.

The Buckeye..... 92
The C. C. Trowbridge.....154
The Favorite.....283
The Hyderabad.....112
The Louie Dole.....479
Theological Seminary, Chicago, *vs.* Gage.....289
Thompson *vs.* Hawks.....440
Thorson *vs.* Peterson.....497
Tillotson *ads.* Mitchell.....325
Toby Furniture Co. *ads.* Singer Rocking Chair Co.....353
Toledo, Peoria and Warsaw R. R. Co. *ads.* Hancock....148

Trowbridge, The C. C.....154
Tysen *vs.* Wabash Railway Co.....510

U.

Union Mutual Life Insurance Co. *vs.* Dice.....373
United States *ads.* Bates..... 70
United States *ads.* Doyle.....100
United States *ads.* Ralph..... 88
United States *vs.* Gaylord.....438
United States *vs.* Hamilton..... 85
United States *vs.* Kellar.....314
United States *vs.* Murphy.....415
United States *vs.* Sprague.....376
United States *vs.* Whittier.....356

V.

Van Winkle *ads.* Forsythe.....108

W.

Wabash Railway Co. *ads.* Tysen.....510
Walrath *ads.* Phœnix Mutual Life Insurance Co.....432
Western Electric Light Co. *vs.* Chicago Electric Light Manufacturing Co.....427
Western Union Telegraph Co. *ads.* Public Grain and Stock Exchange.....568
Whiteley *ads.* McClelland.....444
Whittier *ads.* United States.....356
Williar *vs.* Irwin..... 57
Wilson *vs.* Singer Manufacturing Co.....298
Wray *ads.* Edwards.....251

Y.

Young *ads.* Northern Illinois Coal and Iron Co.....331

CASES

ARGUED AND DETERMINED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

SEVENTH JUDICIAL CIRCUIT.

JOHN S. KENNEDY *et al.*, TRUSTEES, ETC., vs. CITY OF INDIANAPOLIS *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1878.

IN EQUITY.

1. EMINENT DOMAIN—CONDEMNATION OF LAND FOR CANAL—FEE PASSES.—The Supreme Court of Indiana having decided that where a canal is constructed by the state and damages paid for the property, the state acquires the fee to the bed of the canal and not a mere easement, this court will follow such construction of the laws of the state.

2. BENEFITS SET OFF AGAINST DAMAGES.—The Indiana Supreme Court having also decided that it was competent for the commissioners in assessing the damages to the property owners, to consider also the benefits which would result to them from the construction of the work; this court will consider that as the settled rule of the state.

3. BENEFITS AND DAMAGES EQUAL—CONDITIONAL FEE.—But if the commissioners assess the benefits as equal to the damages, and hence find no damages to be paid, the state acquires only a conditional fee in the property taken, the condition being that the work shall be proceeded with and the benefits actually received by the property owners.

4. ABANDONMENT OF CANAL—REVERTING OF FEE—RIGHTS OF PROPERTY OWNERS—LOSS OF BENEFITS.—And where upon the construction of a canal by the state, the commissioners assessed the benefits to the property owners as equal to their damages, and the canal was abandoned immediately after its construction, it was *held* that the benefits to property owners which were taken into consideration by the commissioners in assessing the damages, having failed by reason of the abandonment of the canal by the state, the fee to the bed and banks of the canal reverted to the property owners and did not pass to the grantees of the state.

5. FEE IN STREET WHERE CANAL WAS.—If the state takes possession of a public street wherein to construct a canal, and abandons the canal upon its construction, a conveyance by the state of the canal, its bed and banks, will not pass the title to the street. Upon the abandonment of the canal the public and the abutting property owners become re-invested with their rights.

T. A. Hendricks, and *A. G. Porter*, for plaintiffs.

S. Claypool, for city of Indianapolis.

David Turpie, and *Harris & Calkins*, for lot-owners.

DRUMMOND, J.—By the legislation of this state, commenced in 1832 and ending in 1836, various systems of internal improvement were inaugurated and directed to be carried into effect; among others was the construction of a canal, connecting the Wabash and Erie canal with the Ohio river, and it was provided that this canal, called the Central canal, should be constructed by the way of Indianapolis. Accordingly the work was commenced and executed to a greater or less extent in 1837, 1838, and 1839. The controversy in this case grows out of the construction of the Central canal between Market street in Indianapolis and the southern part of the city along Missouri street and through a part of blocks 121, 125 and 126. The canal seems not to have encroached on any part of block 128.

One of the questions in the case is, as to the extent of the completion of the canal between Market street and the

southern terminus of the city. I have assumed that the conclusions drawn by their counsel from the plaintiffs' testimony are substantially correct, viz.: That there was an excavation made under the authority of the state; that there was a tow-path more or less finished, and that there was water drawn into the canal between Market street and the southern portion of the city. It is true that, according to the testimony of the defendant's witnesses, some portions of the bed of the canal might be said to be in an unfinished condition. Stumps were left in various parts, and there is doubt whether the whole of the tow-path, even on one side, was entirely finished. But perhaps where these stumps were left the canal was deeper, and when the water came in it would be so deep there could be navigation upon the canal notwithstanding those stumps.

I have assumed, therefore, that there was a canal made; that there was an excavation, and that water flowed into that excavation, and some kinds of boats could be navigated there. In fact, however, there never was any use of this portion of the canal as a navigable canal, and immediately after the canal was so far made, various obstructions were placed across it and in it, so that it could not have been used as a navigable canal. For example, there was a bridge placed across it at Washington street, and another at Kentucky avenue, not constructed as upon a canal. There were timbers thrown across the canal; there were fences and stakes placed in it, and there was, almost immediately after the work was, as it is said, completed, and after it had been received as a finished work by the engineer, an abandonment of it by the state as a canal. The state ceased to carry out the general plan that had been adopted by its legislation, and proclaimed, so to speak, to the world that it was incapable of executing it, and all that there was remaining of this proposed canal from Market street south through the premises

in controversy was an excavation through which water flowed, to run a mill in the southern part of the city. There were occasionally small boats there, but there was no regular canal-boat ever taken through this portion of the canal, although there seems to have been a lock at Market street.

It is necessary now to consider the status of the owners of the property upon this portion of the canal. The town of Indianapolis had been laid off by the state upon lands that had been granted to it by the United States for the capital of the state. It had been laid off into streets and lots, and among the streets thus laid off was Missouri street, and the lots were sold abutting upon that street as upon others, and by the rule of law established by the Supreme Court of this state, as I understand, in the absence of any clear intent shown by the owner, or indicated upon the plat of the town to the contrary, the abutting owners owned the lots to the center of the street, subject to an easement on the part of the public. So that Missouri street being thus laid off under the authority of the state and lots sold abutting on it, the owners of those lots owned to the center of the street, subject to the public use. There does not seem to have been any permission granted to the state by the town authorizing it to construct a canal along Missouri street. Nor does there seem to have been any permission granted by the abutting owners nor any compensation given to them by the state, but the state, by virtue of its sovereign power, assumed control of Missouri street and constructed a canal upon it, on the basis that it had the right so to do. There was then this public street laid off by the state as one among the public highways of the town of Indianapolis. There was this right of the abutting owners in the property at the time the canal was there made.

Blocks 121, 125 and 126 were the property, at the time

the canal was run through them, of two persons, Van Blaricum and Coe. Van Blaricum claimed compensation in damages when the canal was proposed to be constructed through his land, and adopted the proceedings pointed out by the law to obtain them. The commissioners appointed reported that the benefits which he would receive from the construction of the canal equaled any damages that his property might sustain; and therefore, allowed him no compensation in money for taking his property.

It is alleged that Coe waived any right he might have had to damages. This is denied in the answer, and there is no proof upon the subject one way or the other. It may be said here that there is no controversy but that the defendants who now claim rights in that portion of the canal in these three blocks, have the original title of Van Blaricum and Coe.

Now, this being the state of the case in relation to this property, the question is, what rights had the state acquired either upon Missouri street or upon blocks 121, 125 and 126; and if the state acquired rights how are they affected by what has taken place since this portion of the canal was opened. It may be observed that there is no question but that the plaintiffs or their mortgagors have whatever rights the state had at the time the conveyance was made to its grantees in 1850.

The plaintiffs in this case filed their bill to quiet the title to the land in controversy—the bed of the canal and its banks from Market street south—for the reason, as alleged, that it belongs to the Indianapolis, Cincinnati and Lafayette Railroad Company; and that they are trustees of mortgages which have been given by railroad companies of which that is the successor and representative; and that they have called upon the railroad company to protect its rights to this property, and that it has declined; and, therefore, they, as

trustees of mortgages, have filed a bill for the protection of those rights.

It has been decided by the Supreme Court of this state, in the case of the *Water Works Company of Indianapolis vs. Burkhart*, 41 Indiana, 364, that, by virtue of the legislation which existed at the time this canal was constructed, the state, when damages were given for the use of the property, acquired the fee in the soil—in the bed of the canal,—and, although that is contrary to the decision of the same court, made in *Edgerton vs. Huff*, 26 Indiana, 35, I am not now disposed to question the law of the case. But, in overruling *Edgerton vs. Huff* the court considered it was bound to take all the legislation upon the subject together, not considering simply the act of 1836, but the question arose in that case in relation to land, or land covered by water, (because it was a controversy about some ice that was taken from the canal,) which had been paid for by the state in money. The law provided, and I assume that was the rule in the case, that it was competent for the commissioners to take into consideration in assessing the damages which were to be allowed to property owners, the benefits which might result from the construction of the work. The Supreme Court decided that it was competent so to do under the constitution of the state, which declared that no private property should be taken without just compensation. But the question does not seem to have been distinctly considered in the *Water Works Company vs. Burkhart*, what might be the effect of that provision of the constitution where a part of the consideration, or the whole, given to the owners was the benefits to be derived by them from the completion of the work, if the work was actually abandoned—if in point of fact there never was a completed navigable canal. If we concede the correctness of the rule laid down by the Supreme Court of this state, that benefits might form the whole or a

part of the consideration for the taking of private property, it would seem to be an injustice to take property, allowing nothing for it except the benefits, and then deprive the owner of any benefits whatever, by the non-completion or instant abandonment of the work.

A strong illustration is found in the case of Van Blaricum. He was not allowed a dollar of compensation for the property that had been taken. It was said by the commissioners that the benefits which he received from the construction of the work were equal to any damage he might sustain for taking his property. If so, it must have been because of the real benefits received as understood by the commissioners. To excavate the land, to permit the water, temporarily, to flow through the excavation, and then immediately abandon it entirely, could not be said to be the benfits conferred upon Van Blaricum for taking his land. So that it seems to me we must consider, in reference to this part of the case and the effect of the action of the state in taking the property under the circumstances in which this property was taken and then abandoning it as a canal, the difference there would be between a case where the state had actually paid the value of the property and where it paid nothing except in supposed benefits by the construction of the work. But it is said that, even conceding that nothing has been paid, the result is the same as though compensation had actually been given, because if no claim was made it is to be presumed the owners acquiesced and did not ask for damages, and, therefore, that the fee of the property is vested in the state precisely as though the value in money had been paid. I think a conclusive consideration in connection with that view of the case is the fact that the owners must have been presumed to acquiesce and ask for no damages, because they supposed they were to receive the improvement which the state contemplated, viz., the canal—

and that their property was to be benefited by the actual construction and continuance of the canal.

Now this is not a case where property has been taken and used by the state for one purpose, and then diverted to another, but where it has been taken for a particular purpose and then without use, entirely abandoned by the state. And what is the claim on the part of these plaintiffs representing the railway company in relation to Missouri street? It is this: that, although the street was laid off by the state as a public highway; although the town of Indianapolis possessed it and had authority over it as such; and the state then took it for a canal, and abandoned it immediately in 1839 or 1840, and more than ten years prior to the conveyance by the state, and more than twenty years before the filing of this bill, in consequence of what had taken place, the state was clothed with absolute title in fee simple to Missouri street; and that the railroad company is vested with the absolute right of property in that street, and can use it as private property.

I must confess I do not feel inclined, under the facts in this case, to sustain such a claim on the part of the plaintiffs. I think it must be held that when the state, even admitting it had the right to take it for canal purposes, abandoned it as such, that the public then became reinvested with the right which had previously existed in it, and that it was thenceforth a public highway. Any other view of it certainly would be unjust to the public. It would be unjust to the abutting owners of property on the street. It is said it must be assumed that the state would not undertake to grant what it had not the right to convey. I will not assume that it was the intention of the state in the general conveyance which it made of this canal, its bed and banks, to clothe the vendees with the absolute title to the property in Missouri street. I will rather infer that it intended to convey the

right which at the time it actually had elsewhere. And it is to be observed that the state has done nothing in relation to this street, nor have its grantees done anything to assert a right of property from the time that the work was abandoned in 1839 or 1840, up to the time this suit was commenced, unless it was to protest against the construction of the sewer built by the city in and along Missouri street. Everything that indicated abandonment on the part of the state was permitted to remain just as it was, and nothing has occurred except this protest and the filing of this bill to show that these parties claimed absolute rights in this property. Then as to blocks 121, 125 and 126, no money was paid by the state for that property. So far as we know, no control was exercised over it after the abandonment of the canal by the state. There was nothing to indicate that there ever had been a canal there except that for some years water flowed to run a mill in the south part of the town. For many years prior to the filing of this bill water had ceased to flow, either on Missouri street or through these blocks, and a large portion of the excavation had been completely filled up.

Now, it is claimed that because of what took place, the rights of property, both of Coe and Van Blaricum, were divested, and that the state was clothed with absolute right of property in the canal bed and banks, although not a dollar, so far as we know, was ever paid for it, and although the work was immediately abandoned as such.

If there was any fee taken under these circumstances by the state it was a conditional fee. It was only on the assumption that the parties had what the commissioners inferred that they were going to have—a navigable canal—and when it ceased to be such, the condition upon which the fee was granted, if at all, had not been complied with, and the owners became reinvested with the title to their property. Otherwise, as I have stated, this logical conclusion follows:

that a great state like Indiana would have a right to say to the owners of property within its borders: "We will construct a canal and thus improve your property through which it will pass, and make it more valuable," and then begin its construction in part, let water flow through it for a year or so as here, then abandon it altogether, thereby acquiring the fee in the bed of the canal, banks, etc., and divesting the owners of theirs; then grant it to other parties for value.

I cannot think this is equitable or just, or that the state of Indiana ought, nor will I infer it intended, thus to divest its citizens of their property.

I have been able to give but an imperfect examination to this case. But I do not think it would be possible that any examination I could give would satisfy me that this claim on the part of these plaintiffs is just; and I believe there is no case decided by the Supreme Court of this state which compels me to sustain it. It is to be observed that in all the cases which have come up, as well in the case of the *Water Works Company vs. Burkhart*, as in *Nelson vs. Fleming*, 56 Indiana, 310, in relation to the Wabash and Erie canal, there has been no instance, so far as I can see, where the precise questions that are raised here have been decided. In all the cases the court takes for granted that the canal was a subsisting reality. Even in the case of *Burkhart*, of the ice on the canal in this city, there was at the time the question arose a canal with water in it; and although perhaps it was not precisely the canal which the state contemplated at the time the legislation took place, and although the water was only used for hydraulic purposes, still there was a *quasi* canal, and compensation had been paid for the land; and this question does not, in any of these cases, appear to have come up and been decided by the Supreme Court. So I feel free to decide this case in conformity with my opinion of right

and justice. If the Supreme Court of the United States shall think differently, of course I will acquiesce. But according to my own views I must dismiss this bill.

GRESHAM, J., concurring.

This case was affirmed by the Supreme Court in 103 United States, 599. [*Reporter.*

CHARLES W. LEA *et al.* vs. FRANK DEAKIN.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1879.

IN EQUITY.

1. TRADE MARKS—"WORCESTERSHIRE SAUCE" IS A GENERIC TERM.—The term "Worcestershire Sauce" has become generic as applied to a certain kind of table sauce, and cannot be exclusively appropriated by the complainants simply because they reside in Worcestershire, England.

2. RES JUDICATA—FORMER DECREE IN ENGLAND.—A decree rendered by the Master of the Rolls in England, refusing an injunction and dismissing a bill in equity to restrain the infringement of an alleged trade mark, and which was not appealed from, is a complete bar to a suit brought in this country for the same purpose by the same complainants against the agent of the defendant in the English suit.

Rogers & Appleton and *Henry M. Collyer*, for complainants.

Charles E. Pope and *George C. Christian*, for defendant.

DRUMMOND, J.—This case has been ably and fully argued by the counsel of the respective parties, and as it has been

pending for a long time, although I have not had, from other engagements, the opportunity of considering it so thoroughly as I could wish, I may state now the conclusions at which I have arrived, without going into any special detail of the reasons leading to such conclusions. The plaintiffs are, and have been for a long time, the manufacturers of what has been called "Worcestershire Sauce," in Worcestershire, England. It is at present, and has been for some time, known as "Lea & Perrins' Worcestershire Sauce." The defendant is a resident of Wisconsin, and has been in the habit of receiving from England a sauce somewhat similar to that of the plaintiffs which is called the "Improved Worcestershire Sauce," prepared by Richard Millar & Co., of London. The defendant is their agent for the sale of this latter sauce in this part of the country. I think the proof establishes that there has long been known in the market a certain kind of sauce used for the table, on fish and meats of various kinds, as "Worcestershire Sauce;" that it is a sort of generic term given to this kind of sauce from the fact that it was originally manufactured in Worcestershire, England. It seems to have been manufactured also in other places, and the term "Worcestershire Sauce" seems to have been applied to that species of sauce. Under the circumstances, therefore, it can hardly be claimed that the plaintiffs, simply because they reside in Worcestershire, and manufacture a sauce which they call "Worcestershire Sauce," have the sole right to the application of the term to that species of sauce. I think that the proof also shows that the plaintiffs have been cognizant for many years of the fact that there was this kind of sauce manufactured to which the term was applied; that for many years they took no steps to prevent the parties from manufacturing the sauce; and that, therefore, there may be said to have been something in the nature of an acquiescence in the manufacture of the sauce.

The proof also shows that the plaintiffs filed a bill in Chancery in England against the principal of the defendant, Millar, of London, on the ground that he or his company were manufacturing the very species of sauce which is the subject of controversy in this case, asking for an injunction to restrain him from such manufacture, and from using the term "Worcestershire Sauce," they claiming that they had the right to it as a trade-mark, and that no one else could use it without their consent, and also asking for an accounting from the defendant. The case was heard by the Master of the Rolls, Sir George Jessel, and fully considered by him in 1876, and the injunction was refused and the bill dismissed.[1] There was no appeal from this decree; on the contrary, it seems to have been acquiesced in by the plaintiffs. I see nothing in the record to raise a doubt that the case was decided on its merits. I think, therefore, that case is a bar to the action of the plaintiffs. They brought the suit against Millar, the principal of the defendant in this case, on the very subject-matter of controversy here; they asked for an injunction for the same reasons that the injunction is asked here, and for substantially the same general relief. It was refused by the Master of the Rolls, and the bill dismissed. Deakin, the defendant here, has acted for Millar, the defendant in that case. It would be an anomaly if it were true that Millar could manufacture and sell his sauce in England, and at the same time Deakin, who sells it here, and obtains it from him, could be restrained here at the instance of the plaintiffs from selling it.

By agreement between the parties, and the order of the court, many of the questions on the admissibility of evidence were submitted to the Master, and he made his report thereon to the court, and exceptions have been taken to his report.

[1] See Sebastian on Trade Marks, 305; Seton on Decrees, 4th ed., 242.

It is unnecessary for me to consider these various exceptions. It is sufficient to say, I think, there is evidence in the case which ought to be admitted, and from which these conclusions can be deduced. The result will be, therefore, that the bill will be dismissed.

A name which has become generic in meaning cannot be appropriated as a trade-mark. *Canal Company vs. Clark*, 13 Wall., 311, 323; *Thompson vs. Winchester*, 19 Pick., 214; *Wolff vs. Goulard*, 18 How. Pr., 64; *Sherwood vs. Andrews*, 5 Am. Law Reg. N. S. 591; *Candee vs. Deere*, 54 Ill., 439; *Singer Mfg. Co. vs. Wilson*, Law Rep., 2 Ch. Div. 434; *Cocks vs. Chandler*, Law Rep. 11 Eq., 446; *Ford vs. Foster*, Law Rep. 7 Ch. Appeals, 611; *Burke vs. Cassin*, 45 Cal., 467; *Burnett vs. Phalon*, 9 Bosw., 192; *Binninger vs. Wattles*, 28 How. Pr., 206; *Singleton vs. Botton*, 3 Doug., 393; *Canham vs. Jones*, 2 Vesey & Beames, 218. But see *Newman vs. Alvord*, 49 Barb., 588; *Congress Spring Co. vs. High Rock Spring Co.*, 45 New York, 291; *Dunbar vs. Glenn*, 42 Wis., 118; *Witherspoon vs. Currie*, Law Rep., 5 English & Irish Appeals, 508.

There can be no trade-mark in the name "Singer Sewing Machine." *Singer Manuf'g Co. vs. Larsen*, 8 Bissell, 151. The word "Parabola" used as the name of needles, not being descriptive of any peculiar quality of the needles, is a valid trade-mark. *Roberts vs. Sheldon*, Id., 398. So the term "Yankee" applied as the name or label upon soap, is a valid trade-mark. *Williams vs. Adams*, Id., 452. [*Reporter.*

FRANK DEAKIN, USE, ETC., vs. HARLES W. LEA *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1879.

1. REMOVAL OF CAUSES—WHEN ONE PARTY IS A FOREIGNER.—If a citizen of a foreign country brings suit in a State Court against a citizen of the state, the latter may remove the cause to the Federal Court under the first clause of section 2, of the Act of 1875.

2. But the last clause of section 2, of the Act of 1875, authorizes removal only in suits between citizens of different states, and does not apply to foreigners.

3. REMANDING CAUSE—EFFECT OF ENTERING LIMITED APPEARANCE IN STATE COURT.—Where a subject of Great Britain brought suit in the State Court upon a joint and several bond, against a citizen of the state of Illinois and two other subjects of Great Britain; and the citizen of Illinois entered his general appearance in the State Court and the two defendants subjects of Great Britain, no service being had, entered their appearance by counsel, in the State Court, solely for the purpose of petitioning for a removal of the cause; and thereupon all three defendants did petition for removal, and removal was had, it was *held* that as the bond was executed in a suit in, and under the order of this court the Federal Court would retain jurisdiction, and would not remand the cause.

4. WHEN CAUSE WILL BE REMANDED.—If a suit has been removed from the State to the Federal Court it will not be remanded unless it appears to the satisfaction of the court that it has no jurisdiction.

5. DAMAGES ON INJUNCTION BOND—WHEN AWARDED.—Whether a suit can be maintained upon an injunction bond given in the Federal Court, under a general order of the court, conditioned "to pay all damages and costs that may be awarded * * * upon the dissolution of said injunction," when no damages were awarded by the court at the time of the dissolution, in the light of the statutes of Illinois and the decision of the United States Supreme Court in *Bein vs. Heath*—discussed but not decided.

6. In such case however if the State Court would be compelled under the statutes to sustain the suit, the Federal Court ought to be bound by the same rule.

C. E. Pope, for plaintiff.

Henry T. Rogers, for defendants.

DRUMMOND, J.—Frank Deakin, a subject of the queen of Great Britain and Ireland, brought a suit in the State Court on a bond, against Charles W. Lea, James D. Perrins, also subjects of the same sovereign, and John Crerar, a citizen of the state of Illinois. The bond was executed in August, 1878, and was given under an order entered in a suit pending in this court, where Lea and Perrins were plaintiffs, and Deakin was defendant, and in consequence of the continuance of an injunction which had been issued by this court against the defendant. The defendant having made application to the court for further security upon the continuance of the injunction, the bond in controversy in this case was given in the penalty of five thousand dollars. The order of the court was simply that a bond should be given by the plaintiffs, with security to be approved by the court. Neither the form nor the condition of the bond was prescribed by the court in its order. The condition of the bond which was actually given was as follows: that the obligors "shall well and truly pay, or cause to be paid to the said Frank Deakin or his assigns all damages and costs that shall be awarded against said Lea and Perrins, complainants, and in favor of said defendant Frank Deakin upon the trial or final hearing of the said cause or upon the dissolution of said injunction by reason of the wrongful or improper issuance of the same."

Crerar entered his general appearance in the State Court. Lea and Perrins, by their counsel, entered an appearance in the State Court, as they said, solely for the purpose of petitioning the court for the removal of the cause to this court; and thereupon Crerar filed a demurrer to the declara-

tion in the case, and then all the defendants joined in the petition for the removal of the cause to this court; and they all executed the bond required by law in cases of removal. Under these circumstances, the case came into this court and is now pending here.

An application is now made by the plaintiff in the cause to remand it to the State Court on the ground that this court has no jurisdiction. The jurisdiction of this cause must be sustained on one of two grounds; either because of the citizenship of the parties, or on account of the subject matter in controversy. If this suit be considered as an action against Crerar only, and that Lea and Perrins have simply joined him for the purpose of removing the suit to this court, and are not in court for any other purpose, then there can be no doubt that this court would have jurisdiction of the case; for if it had been a suit against him alone, without naming Lea and Perrins, he undoubtedly could have removed the cause to this court under the second section of the Act of 1875.

It is claimed now by the counsel of the defendants that the only object of Lea and Perrins was to remove the suit to this court, and that they did not enter their appearance for any other purpose; and that there was, therefore, no general appearance so as to make them subject personally to the jurisdiction of the court. There may be some doubt whether what they have done does not constitute a general appearance in the cause, and whether it is necessary for them to appear, by pleading or otherwise, in order to give this court complete jurisdiction of their persons; but as there may be a doubt as to what is the effect of the action on the part of Lea and Perrins, I do not feel inclined on that account to send the case back to the State Court, and particularly when the bond in this case is a several as well as a joint bond, and each party is severally liable for the whole amount of the

damages which may be recovered upon it. It is undoubtedly true, however, that the last clause of the second section of the Act of 1875 does not provide for a case where there is a separate controversy between a subject of a foreign government and a citizen of one of the United States, but only to a controversy between citizens of different states, and where the suit is sought to be removed by one or more of the plaintiffs or defendants.

Then in relation to the subject matter of the controversy. The language of the fifth section of the Act of 1875 is, if in any suit removed from a State Court to the Circuit Court of the United States it shall appear to the satisfaction of said Circuit Court after the removal of the cause, that such suit does not really and substantially involve a controversy within the jurisdiction of the said Circuit Court, then it shall proceed no further in the suit, but shall remand it to the court from which it was removed; so that it has to appear to the satisfaction of the court that it has no jurisdiction of the cause before it can be sent back to the State Court. There is some difficulty, I think, in this question. This action is on a bond executed for the benefit of the defendant in the former suit, in consequence of the order of this court. It may be that the bond was not strictly in compliance with the order. It was nevertheless a bond executed because the order of the court was made, and in a suit pending in this court, and was, therefore, an instrument growing out of a controversy in this court, and I am not clear that this court has not jurisdiction of the case on account of the subject matter in controversy here.

The condition of this bond is not in precise conformity with the practice of this court in injunction bonds. At the same time, as I have said, the object of the court and of the parties it is to be presumed, was to give indemnity to the defendant in the cause. I am inclined to think that

prior to the passage of the Act of 1861 in this state this bond would have been a valid bond, upon which an action would have been maintainable in the courts of this state under the last clause of the condition, "to pay all damages and costs that may be awarded * * * upon the dissolution of said injunction."

There are various decisions of the courts of this state, prior to the passage of the Act of 1861, in which it was decided that where language like this was used, viz: "all damages and costs that may be awarded in case of the dissolution of the injunction," it was not necessary that the damages should be awarded by the court in which the cause was pending and in which the bond was given;[1] and that it might properly refer to the case of damages awarded where a suit was brought upon the bond; and it seems to me where they have held otherwise, as they have in some cases since, it was because of the effect given to the Act of 1861, by which it was competent for the party, where the injunction was dissolved, to ask the court to assess the damages which he had sustained in consequence of the issuing of the injunction; and since the act of 1874 and the proviso contained therein[2] that a failure to assess damages shall not operate as a bar to an action on the bond, and which seems to have been passed in order to meet some of the decisions of the Supreme Court of this state, it may be, I think, a very questionable matter whether or not, if this bond had been filed in a case in the State Court it would not have been a valid bond, and the breach would not have been complete if there had been damages sustained, although the court did not award any damages upon the dissolution of the

[1] *Ryan vs. Anderson.* 25 Illinois, 372; *Hibbard vs. McKindley*, 28 Illinois, 240; *Brown vs. Gorton*, 31 Illinois, 417; *Edwards vs. Edwards*, 31 Illinois, 478; *Phelps vs. Foster*, 18 Illinois, 309; *Russell vs. Rogers*, 56 Illinois, 176.

[2] Illinois Revised Statutes, chap. 69, sec. 12.

injunction. Of course, it is to be understood that the order for the dissolution of the injunction which was issued and during the pendency of which the bond was given, was made by this court.

I think it proper to state that at the time of a consultation between Judge BLODGETT and myself as to the effect of the decision of the Supreme Court of the United States in *Bein vs. Heath*, 12 Howard, 168, (when suits on some of these bonds were pending before him,) I was not aware of the proviso in the act of 1874, and I am not now prepared to say how far that fact, if it had been brought to my knowledge, would have modified my opinion as to the effect of the case of *Bein vs. Heath*. At any rate, I am inclined to think, in view of what the Supreme Court of the United States said in that opinion that it may become a very serious question whether this might not be a valid bond, by virtue of the proviso in the act of 1874, notwithstanding that case, and I should very much like to have the opinion of the Supreme Court taken upon the order by which as I understand the demurrer was sustained in those cases and the suits dismissed. In the consultation which Judge BLODGETT and I had upon that case, before he called my attention to *Bein vs. Heath*, I stated to him I thought that, as at the time this bond was executed it must be presumed that the parties were aware that the court in which the case was pending could not assess any damages, we must also presume that it was contemplated that the damages sustained were to be assessed in an independent suit brought upon the bond; but when the case of *Bein vs. Heath* was examined, it seemed as though there could not well be any escape from the effect of that decision, and that it necessarily ruled the cases then pending before Judge BLODGETT.

If this case is sent back to the State Court, we must presume that the decision would be such as this court or the

Supreme Court of the United States would render. The only ground upon which it can be claimed that there might be a difference is, as I understand, because it may be presumed that the bond was given under the law of this state, and under the statutes which would apply to it, and therefore that a decision of the State Court would be upon a statute of the state, and therefore, it would be bound to give effect to the proviso of the act of 1874. It would only do that upon the ground that it was effectual and binding in a case pending in the Federal Courts, and if binding here, it *ought* to be so ruled by this court as well as by the State Court.

On the whole I am inclined to retain jurisdiction of the case in this court, and shall, therefore, overrule the motion to remand.

See also the succeeding case of *Deakin vs. Lea.* [*Reporter.*

FRANK DEAKIN, USE, ETC., VS. CHARLES W. LEA *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—APRIL, 1882.

1. JURISDICTION OVER PERSON—APPEARING TO PETITION FOR REMOVAL IS GENERAL APPEARANCE.—If defendants who are not served with process in a suit in a State Court enter their appearance by counsel solely for the purpose of joining in a petition for removal to the Federal Court, "and for no other purpose whatsoever," as expressed, and the cause is removed to the Federal Court, such appearance so entered will it seems give the court jurisdiction over such defendants for all purposes the same as though process had been personally served upon them.

2. INJUNCTION BONDS—AWARDING DAMAGES—SUIT ON BOND—FEDERAL PRACTICE.—Where upon a general order for an injunction bond in the Federal Court a bond was given in conformity to the state statutes and practice in the State Courts, conditioned to pay all damages and costs that shall be awarded against the complainants and in favor of the defendant, "upon the trial or final hearing of the cause, or upon the dissolution of the injunction," and no damages are awarded by the court upon the final hearing of the case and the dissolution of the injunction, no suit can be maintained upon the bond under the ruling of the United States Supreme Court in *Bein vs. Heath*.

3. SAME.—The fact that suit can be maintained upon a similar bond given in the State Court, under the state statutes, does not rule the practice in the Federal Court.

C. E. Pope, for plaintiff.

Samuel Appleton, for defendants.

DRUMMOND, J.—A suit was brought by the plaintiff, a subject of the Queen of Great Britain, against Lea and Perrins, also subjects of Great Britain, and Crerar, a citizen of Illi-

nois. No one of the defendants was served with process. On the 21st of June, 1879, Lea and Perrins, by their counsel, entered their appearance in the cause solely for the purpose of petitioning the State Court in which the suit was brought, for the removal of the cause to this court, "and for no other purpose whatsoever." On the same day, Crerar filed a demurrer to the declaration, and at the same time all three of the defendants petitioned the court for the removal of the cause to this court on the ground that Deakin was an alien and a subject of the Queen of Great Britain, and Lea and Perrins were also aliens and subjects of Great Britain, and Crerar was a citizen of Illinois, and gave bond as required by the Act of Congress.

If Lea and Perrins had not thus appeared, but Crerar only had appeared and moved to transfer the case to this court, I think there could be no doubt of the jurisdiction of the court. The case being in this position, a motion was made in 1879 to remand the cause, which was overruled, partly because of the subject-matter—a bond taken under the order of a court of the United States. I think that by the appearance of Lea and Perrins, although for the purpose alone of having the case transferred to this court, when the case came here they were subject to the jurisdiction of this court, and that for all the purposes of jurisdiction it was the same as though process had been personally served upon them. However, it may not be necessary to decide that question according to the view which I take of the case.

This being the *status* of the case, the counsel have argued the demurrer of Crerar to the declaration. Undoubtedly this is an action against each of these defendants separately; that is to say, each one is liable for any damages that may accrue upon the bond and for which an action is maintainable; and it would therefore be competent if the demurrer were overruled, for Crerar to stand by his demurrer

and let judgment go as to him upon the demurrer and for the other two to plead jointly or separately.

The difficulty about this case consists in the peculiar phraseology of the last clause of the second section of the Act of 1875: "And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the Circuit Court of the United States for the proper District." It does not give the power of removal in a case where there is a controversy between a citizen of the United States and a citizen or subject of a foreign state or country; but in this class of cases it must be a controversy between citizens of different states of this Union.

Now this is a controversy between a subject of the Queen of Great Britain, two subjects of the same country, and a citizen of the state of Illinois, if we assume that all three of the defendants are before the court and subject to its jurisdiction. I shall retain the case for the reasons given when the motion to remand was overruled.[1]

As to the merits of the demurrer, my opinion is that the case of *Bein vs. Heath*, 12 Howard, 168, is in the way of maintaining any action on this bond in favor of the plaintiff.

That was a case where the parties gave an injunction bond with a condition such as was prescribed by the practice in the state of Louisiana. The condition of the bond was: "the above bounden Mary Bein and Gilbert S. Hawkins and James McMasters, sureties, will well and truly pay to the said Mary Heath, the defendant, in said injunction, and plaintiff in said case of seizure and sale, all such damages as she

[1] See *Deakin vs. Lea*, *ante*, page 27.

may recover against us in case it should be decided that the said injunction was wrongfully obtained."

The Supreme Court says, that this being a condition in conformity with the usage or law of Louisiana, there could be no suit maintained upon the bond because, being a bond given in the courts of the United States, it was not in conformity with the practice of the court or according to established principles of equity that an assessment should be made of the damages in that case by the Federal Court. The language of the court is: "And when an injunction is applied for in the Circuit Court of the United States sitting in Louisiana, the court grant it or not according to the established principles of equity, and not according to the laws and practice of the state in which there is no court of chancery, as contradistinguished from a court of common law. And they require a bond, or not, from the complainant with sureties, before the injunction issues, as the court, in the exercise of a sound discretion, may deem it proper for the purposes of justice. And if, in the judgment of the court, the principles of equity require that a bond should be given, it prescribes the penalty and the condition also. And the condition prescribed by the court in this case, but which was not followed, is the one usually directed by the court.

"In proceeding upon such a bond, the court would have no authority to apply to it the legislative provisions of the state. The obligors would be answerable for any damage or cost which the adverse party sustained, by reason of the injunction, from the time it was issued until it was dissolved, but to nothing more. They would certainly not be liable for any aggravated interest on the debt, nor for the debt itself, unless it was lost by the delay, nor for the fees paid to the counsel for conducting the suit.

"But the bond in the case before us, is not one to pay the damages which the opposing party should sustain by reason

of the injunction, but it is to pay the damages that might be recovered against them; obviously referring, we think, to the practice in Louisiana above mentioned. A court proceeding according to the rules of equity cannot give a judgment against the obligors in an injunction bond when it dissolves the injunction. It merely orders the dissolution, leaving the obligee to proceed at law against the sureties, if he sustains damage from the delay occasioned by the injunction. This was done by the Circuit Court in the former suit between the parties. No judgment was or could be given against the obligors for debt or damages, and none were recovered against them previously to the institution of this suit. The contingency on which they agreed to pay has not, therefore, happened, and the condition of the bond is not broken, and consequently no action can be maintained upon it."

Now, the condition of this bond is: "If the above bounden, Charles W. Lea and James D. Perrins, their executors and administrators, and any of them, shall well and truly pay, or cause to be paid to the said Frank Deakin, or his assigns, all damages and costs that shall be awarded against said Lea and Perrins, complainants, and in favor of said defendant, Frank Deakin, upon the trial or final hearing of the said cause, or upon the dissolution of said injunction by reason of the wrongful or improper issuance of the same, then the above obligation to be void, otherwise to be and remain in full force and effect." In the opinion which I gave before, I cited several cases decided by the Supreme Court of this state, in which it had been held that an action could be maintained on a bond of this kind, and the damages assessed in a suit on the bond, before the act was passed authorizing a court of equity to assess damages on the dissolution of an injunction. After that act was passed the Supreme Court of this state, held that the damages must be assessed by the court on dissolving the injunction in order to entitle the

party to maintain a suit, but afterwards, in the Revised Statutes of 1874, the law was changed and there was a proviso declaring, in substance, that the fact that no damages were assessed by the court dissolving the injunction should not preclude a party from maintaining a suit upon the bond; and since that condition was annexed to the statute the Appellate Court has held that a suit was now maintainable on the bond with a condition such as is contained here, notwithstanding the court which dissolved the injunction did not assess any damages.

That being the state of the law in Illinois, if it were not for the case of *Bein vs. Heath*, I should be inclined to sustain an action upon this bond, notwithstanding the condition; but I do not see very well how I can do so, and it strikes me it will always be an insuperable obstacle in the way of a suit upon this bond, and that it will make no difference whether the decision is made here or in the State Courts, for this decision of the Supreme Court of the United States, will control the one as well as the other, and the State Court would have to follow it as we have. I think, upon its authority, I must sustain the demurrer to the declaration. In the language of the Supreme Court in that case, which in principle is precisely like this, "the contingency on which they agreed to pay has not, therefore, happened, and the condition of the bond is not broken, and consequently no action can be maintained upon it."

It was a bond given under the authority of the Federal Court just as this bond was given. In that case the condition of the bond was prescribed by the court, but it was not followed. In this case the condition of the bond was not prescribed, but the court required that a bond in the penalty of $5,000 should be given, and the bond was given with the amount named. If this decision is to stand, then it seems

to me it will be in the way always of a recovery upon this bond.

The demurrer of Crerar will be sustained.

Consult preceding case of *Deakin vs. Lea*, and succeeding case of *Lea vs. Deakin*. [*Reporter.*

CHARLES W. LEA *et al.* vs. FRANK DEAKIN.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—AUGUST, 1882.

IN EQUITY.

1. DISSOLUTION OF INJUNCTION—INHERENT POWER OF CHANCERY COURT TO ASSESS DAMAGES.—A Court of Chancery has inherent power to assess damages upon the dissolution of an injunction; and where an injunction has been dissolved, the sounder and better rule is for the Court of Chancery to go on and assess the damages sustained by the party against whom the injunction issued.

2. PRACTICE IN THIS, SEVENTH, CIRCUIT.—Such is the practice which will hereafter be adopted in this Circuit.

Motion to refer cause to Master to assess the damages sustained by defendant by reason of the issuing of the injunction.

Samuel Appleton and *Henry M. Collyer*, for complainants.

Charles E. Pope and *George C. Christian*, for defendant, cited:

Statute 17 Richard 2, c. 6, A. D., 1393–4, contained in

English Revised Statutes, ed. 1870, vol. 1, page 265, and and also in Robinson's English Constitutions, vol. 1, page 695. This statute allowed the Court of Chancery to assess damages, and it was not repealed until Civil Procedure Acts Repeal Act, 42 and 43 Victoria, c. 59; see volume 48, Law Journal Reports, N. S., Magistrates' cases, part 2, page 351; 14 Law Reports, General Statutes, page 299. *Newby vs. Harrison*, 3 De Gex, F. and J., 287; *Novello vs. James*, 31 Eng. Law and Eq., 281; *Sturgis vs. Knapp*, 33 Vt., 486; *Center vs. Hoag*, 52 Vt., 408; *Russell vs. Farley*, 105 U. S. 433.

That the Federal Courts are governed by English chancery practice: *Vattier vs. Hinde*, 7 Peters, 274; *Robinson vs. Campbell*, 3 Wheaton, 221; *Boyle vs. Zacharie*, 6 Peters, 658; *State of Rhode Island vs. Massachusetts*, 14 Peters, 210; *State of Pennsylvania vs. Wheeling & Belmont Bridge Co.*, 18 Howard, 460, and other cases.

DRUMMOND, J.—During the progress of this cause, an injunction was issued against the defendant, and afterward, on application of the defendant, the injunction was continued upon condition that a bond with proper sureties should be given. There were three bonds given in this case. After the case had been decided on the merits in this court in favor of the defendant, and had gone to the Supreme Court of the United States and been returned to this court on the stipulation of the parties reversing the decree entered in this court, the plaintiffs voluntarily dismissed their bill at their own cost, and the injunction which was issued in the case was dissolved. Thereupon the defendant moved the court to assess the damages which he had sustained in consequence of the issuing and continuance of the injunction. The litigation between these parties has been of long standing; and this court has decided on suits which have been brought upon some of the

injunction bonds given during the progress of the suit, that as there was no order of this court assessing the damages of the defendant, suits could not be maintained upon the bonds. The condition of these bonds was as follows: The first, "to pay all damages and costs that shall be awarded against said plaintiffs, and in favor of said defendant, Frank Deakin, upon the trial or final hearing of the matters referred to in said bill of complaint;" in the second, "to pay all damages and costs that shall be awarded against said Lea and Perrins, complainants, and in favor of said defendant, Frank Deakin, upon the trial or final hearing of the said cause;" and in the third, "to pay all damages and costs that may be awarded against said Lea and Perrins in favor of said Frank Deakin, defendant, upon the trial or final hearing of said cause, or upon the dissolution of said injunction, by reason of the wrongful or improper issuance of said injunction."

The construction put by the court upon these several conditions was that they referred to damages to be assessed by the court in which the suit was pending, and under whose order the injunction bonds had been given, following the case of *Bein vs. Heath*, 12 Howard, 168. What was said in that case as to the right of a court of chancery to assess the damages against a party at whose instance an injunction has been obtained, has been modified by the opinion of the Supreme Court in the case of *Russell vs. Farley*, 105 United States, 433, in which the English authorities are fully considered; and it seems to be intimated that a court of chancery has the inherent power to assess the damages under such circumstances. We think this view is more in accordance with the genuine principles of equity practice. That court orders the injunction, and prescribes the terms upon which it shall be issued, but may require a bond, stipulation or undertaking as a condition upon which it shall be issued or not, according to its own view of the circumstances of the case.

An assessment of damages thus becomes an incident of the principal case, and enables the court to do entire equity between the parties. If the party against whom the injunction has been issued can thus be indemnified, it would seem to be the duty of the court to proceed in the case and not compel him to resort to an independent action at law to accomplish that result.

The litigation which has grown out of the controversy in this case, and the suits which have been brought upon some of the bonds, have induced the district judge and myself to fully consider this question in the light of all the authorities which have been presented, and we have come to the conclusion that the sounder and better rule is for the court of chancery, where an injunction has been dissolved, to go on and assess the damages which the party against whom it is issued has sustained, and it will accordingly be considered hereafter that that practice may be adopted in this court.

BLODGETT, J., concurring.

See the preceding cases of *Lea vs. Deakin*, and *Deakin vs. Lea*. [*Reporter*.

MAGDALINE VON COTZHAUSEN vs. JOHN NAZRO *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—OCTOBER, 1879.

1. REVENUE LAW—TRANSMISSION OF DUTIABLE ARTICLE BY MAIL—SMUGGLING.—The transmission of a dutiable article from a foreign country through the mails, but without any intent on the part of either sender or receiver to avoid the payment of duties thereon, does not constitute an act of smuggling.

2. SAME—SEIZURE OF ARTICLE—INTENT NOT CONSIDERED.—But under the detailed regulations for the execution of the General Postal Union treaty concluded at Berne, October 9, 1874, and under the statutes of the United States, and the regulations of the Treasury and Post Office Departments, the transmission from a foreign country, by mail, of an article subject to duty, is unlawful, and renders the article liable to seizure by the collector of customs when in the hands of the person receiving it, though there be no intent on the part of either the receiver or the sender to avoid the payment of duties. The statute does not regard the intent so far as seizure of the article is concerned.

3. CONSTRUCTION OF "MERCHANDISE."—The term "merchandise" as used in section 3082, of the Revised Statues, providing for the unlawful importation of merchandise, is not limited to merchandise sent or received for sale, but includes any merchandise, even though intended as a gift from the sender to the receiver.

This was an action to recover the value of a certain article of personal property, which was sent to the plaintiff by a relative residing in Germany, in a sealed envelope, through the mail, and which, it was claimed, had been converted by the defendants to their own use. The defense to the action was, that the defendant, Nazro, was collector of customs, and that the defendant, Payne, was postmaster at the city of Milwaukee; that the article in question was subject to customs duty under the customs laws of the United States; that the

duty not having been paid, the article was liable to seizure and detention, and that the acts done by the defendant, Nazro, were under color of his office and by virtue of the laws of the United States, and that the defendant, Payne, acted under and by authority of the defendant, Nazro, as such collector, aiding and assisting him in respect thereof.

The case was tried by a jury. The proofs were, in brief, that in the month of May, 1877, a sealed package, addressed to the plaintiff, came by mail to the Milwaukee post office; that it came as a registered package, and that the plaintiff was notified of its arrival; that she went to the post office to receive it, and receipted for it according to the usual practice in cases of delivery of registered letters or packages. The package was marked, "suspected liable to customs duty," and the collector of customs was notified of its receipt. There was also an indorsement on the package indicating its contents. The package was then placed in the hands of Mrs. Von Cotzhausen, who opened it, and thereupon the deputy collector, who on notification was present, took it from her hands and thereafter retained it, subsequently causing its contents to be appraised by the Government appraiser. The article enclosed in the package was a knit shawl, made from fine wool, and was appraised at $6.00. It was sent, as the testimony tended to show, to the plaintiff, by her daughter-in-law, residing in Germany, as a present or token of affection. Subsequently personal application was made to the deputy collector by the plaintiff for the article, and she was told that there were two courses for her to pursue; that she could pay the appraised value and take the package, or could apply to the Secretary of the Treasury for permission to pay the duty and receive the package. The matter being placed in the hands of her counsel, the same alternative was submitted to him, and he declined to take either of the courses suggested. After some further negotiations, this suit was

brought, and the article in question has ever since remained in the hands of the collector, but no steps have ever been taken by him to procure a judicial adjudication of forfeiture. It appeared that in receipting for the package at the post office, answering inquiries in relation to it, opening it in the presence of the deputy collector, surrenderng it to his hands and leaving it with him, the plaintiff acted upon the suggestion or request, or under the requirement of those present. At the interviews of the plaintiff and her counsel with the deputy collector, no offer was made to pay the duty, if the property should be surrendered, and Mr. Cotzhausen testified that he was told at the collector's office that it was confiscated as smuggled goods. The seizure was made without regard to the intent of the party sending the package, or that of the party expected to receive it. An entry of the seizure and appraisal was made in the collector's office, and the seizure was reported to the Secretary of the Treasury.

The jury returned a special verdict by which they found:

1. That the article in question was sent from a foreign country by mail, enclosed in a sealed envelope, addressed to the plaintiff at Milwaukee, and was transmitted by mail thus enclosed to its point of destination.

2. That the contents of the package were disclosed by writing placed upon it by the sender.

3. That the package was received at the Milwaukee post office, and that the collector of customs was notified of its receipt.

4. That the package was placed in the hands of the plaintiff by a clerk in the post office, in the presence of the deputy collector, and that she opened it.

5. That the deputy collector then seized the article after it was so opened.

6. That the collector thereafter caused the article to be appraised by the appraiser for this collection district, and that

he refused to surrender it to the plaintiff without payment of the amount of the appraisal.

7. That the article was not sent by mail for the purpose or with intent on the part of the sender or the plaintiff to avoid the payment of duties thereon.

8. That the value of the article on the 21st day of May, 1877, was $4.00.

On this verdict both parties moved for judgment.

F. W. Cotzhausen, for plaintiff.

G. W. Hazelton, U. S. District Attorney, for defendants.

DYER, J.—A proper disposition of the questions involved requires an examination of various statutes and regulation of the Treasury Department touching the collection of duties upon imported articles.

And first, it is not, as I understand, claimed, and certainly upon the testimony there is no ground for claiming that the transmission of the article in question through the mails, even if it is dutiable, was an act of smuggling. It was not a clandestine importation within the definition of that term. The jury has found that it was not sent with intent on the part of the sender or receiver to avoid the payment of duties thereon, and this finding is undoubtedly sustained by the fact that the contents of the package were endorsed on the envelope enclosing it, by the sender.

I do not think there is room for doubt that the article is dutiable. It is a knit woolen shawl, and comes under one of the subdivisions of Class 3, in Schedule L, entitled "Wool and Woolen Goods," in Title 33 of the Revised Statutes, which relates to duties upon imports.

By the detailed regulations for the execution of the treaty concerning the formation of a General Postal Union, conclud-

ed at Berne, October 9, 1874, which regulations were put into execution on the day on which the treaty came into force, and have the same duration as the treaty, and have the force and effect of law,[1] it is provided that "there shall not be admitted for conveyance by the post, any letter or other packet which may contain either gold or silver money, jewels or precious articles, or any other article whatever liable to customs duties."

By section 3061 of the Revised Statutes, an officer of the customs is authorized to search and examine any person on whom he shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or otherwise, and to search any envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if such officer shall find any merchandise on or about such person or in any such envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, he shall seize and secure the same for trial.

Section 3074 provides that in all cases of seizure of property subject to forfeiture for any of the causes named in any provision of law relating to the customs, when in the opinion of the collector making the seizure the value of the property seized does not exceed five hundred dollars, he shall cause an appraisement of the same to be made in the manner prescribed, which appraisement shall be properly attested by the collector and the persons making the appraisal.

Section 3086 provides that "all merchandise or property of any kind seized under the provisions of any law of the United States relating to the customs, shall, unless otherwise

[1] Par. 25, vol. 19, U. S. Stat. at Large, p. 604.

provided by law, be placed and remain in the custody of the collector, * * * to abide adjudication by the proper tribunal, or other disposition according to law."

By section 3081 it is provided that "the collectors of the several districts of the United States, in all cases of seizure of any merchandise for violation of the revenue laws, the appraised value of which, in the district wherein such seizure shall be made, does not exceed one thousand dollars, are hereby authorized, subject to the approval of the Secretary of the Treasury, to release such merchandise on payment of the appraised value thereof."

Section 3082 provides, that "if any person shall fraudulently or knowingly import * * * into the United States * * * any merchandise contrary to law, or shall receive * * * such merchandise after importation, knowing the same to have been imported contrary to law, such merchandise shall be forfeited, and the offender shall be fined * * * or be imprisoned, * * * or both."

By section 251 of the statutes the Secretary of the Treasury is authorized to prescribe rules and regulations, not inconsistent with law, to be used in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports.

On the 9th of July, 1875, the following amended regulation or order numbered 2375, was made by the Post Office Department, with the concurrence of the Treasury Department, and was by the latter department published September 1, 1875, for the guidance of officers of the customs:

"Ordered that section 52, Chap. 3, of the Regulations of the Post Office Department issued by authority of the Postmaster General, on the 5th of April, 1873, as modified by the order of the Postmaster General of January 3, 1874, be modified and amended so as to read as follows:

"Sec. 52. When letters, sealed packages, or packages the

wrappers of which cannot be removed without destroying them, from a foreign country, are received through the mails at any post office, and the postmaster has reason to believe that such letters or packages contain articles liable to customs duty, he shall immediately notify the customs officer of the district in which his office is located, or the customs officer designated by the Secretary of the Treasury to have access to the several post offices to examine the mails arriving from foreign countries, of the receipt of such letters or packages, and the names of the persons to whom the same are addressed, and retain such letters or packages a reasonable time, for the purpose of allowing such customs officers to examine them. Letters registered or ordinary or sealed packages, or packages the wrappers of which cannot be opened without destroying them, can only be opened by the parties addressed; and when such letters or packages are received at the office of destination, stamped as hereinafter provided, the parties addressed should be notified by the postmaster at the office of delivery, that such a letter or package has been received at his office, believed to contain articles liable to duty, and that the same will be returned to the office of the country from whence it came, unless the person to whom it is addressed shall appear at the post office at a time in said notice to be designated, not exceeding twenty days from the date of said notice, and receive and open the said letter or package, in the presence of an officer of the customs; and postmasters are hereby instructed and directed to extend to custom house officers all proper facilities, and permit customs officers, specially designated for that purpose by the Secretary of the Treasury to have access at all times to their respective offices for the purpose of examining mail matter received from foreign countries, in order to protect the customs revenue from frauds practiced through the mails.

Provided, however, that nothing herein contained shall au-

thorize or allow customs officers to seize or take possession of any letter or package whilst the same is in the custody of a postmaster, nor until and after the same has been delivered to the person to whom it is addressed, unless the package, when examined, is found to contain articles liable to customs duty; and provided further, that no letter or package, which is believed to contain articles liable to duty shall be detained at an intermediate office, when the discovery inducing that belief is made at such office, more than twenty-four hours, nor at the office of delivery a longer period of time than may be necessary for the person to whom such letter or package may be addressed to appear, after the notice hereinbefore provided has been given; but when an unsealed package is found, on examination, to contain an article or articles liable to customs duty, it should be delivered to the proper officer of the customs, and the postmaster should inform the person to whom it is addressed of its arrival in the mails and its delivery to the customs officer; and it shall be the duty of a postmaster at an office at which a letter or sealed package (addressed to an interior office,) suspected of containing articles liable to customs duty, shall arrive in the mails from a foreign country, before forwarding such letter or package to the office of destination, to cause the envelope or wrapper thereof to be plainly stamped across its face with the words, 'suspected liable to customs duty.'"

On the 3d of May, 1877, the following order was promulgated by the Treasury Department:

"It appears from official reports received from various officers of this Department, that articles from foreign countries are frequently imported through the mail to the loss of the revenue.

"Such importations, with certain exceptions, are illegal, and the articles become subject to seizure and forfeiture for violation of the revenue laws.

"Collectors of customs, will, therefore, seize all such packages (with the exception of those hereinafter specified) delivered to them under the existing regulations of the Postmaster General, embodied in printed decision No. 2375," which is the order or regulation last before recited as made by the Postmaster General on the 9th of July, 1875.

"If the importation be less than fifty dollars in value, the collector will deliver the goods to the party entitled thereto, on payment of their appraised value, to be accounted for in the same manner as the proceeds of other forfeitures; and if of fifty dollars or more in value, he will report the case to the Department for special instructions."

Certain importations by post from Canada, not exceeding a certain weight, were excepted from the operation of this order.

It should be noticed in this connection, that by regulation of the Treasury Department, made May 16, 1876, it was declared that "the General Postal Union concluded at Berne, October 9, 1874, is not construed by the Department as exempting from customs duty * * * articles received in the mails from postal union countries, which by the laws of the United States are subject to duty; or as changing in any particular the course of proceeding for the collection of customs duties on such articles, prescribed by section 52 of the post office regulations, as modified by the order of the Postmaster General, dated the 9th of July last, and embodied in the printed decision of this Department, No. 2375."

These are the provisions of law and regulations of the Department which it seems necessary to notice. And from them we learn first, that the sending of this article by mail was forbidden, regardless of the intent of the sender. On its arrival at destination, a course of procedure is prescribed relative to seizure and appraisement. When seized, the law places it in the custody of the officer to abide adjud-

ication, with only the right on his part to release it on payment of the appraised value.

The regulations of the Treasury Department are such as are warranted by and not inconsistent with the law, and hence have the effect of law, and I do not see but the officers complied substantially with the regulations.

The only point concerning which there may be doubt is this: Since section 3082 declares that if any person shall fraudulently or knowingly import any merchandise contrary to law, or shall receive it, knowing it to have been so imported, the property shall be forfeited and the person punished, the question is, whether there can be a lawful seizure, if these elements of fraud or guilty knowledge are wanting. Counsel for plaintiff contends that the whole right is dependent upon the intent with which the property is imported. The attorney for the United States argues that the importation was contrary to positive provision of law; that the statute directs the seizure of all property imported contrary to law; that this article being dutiable, it was seized in pursuance of the statute; that if a positive law was violated in importing the article, that fact rendered the article forfeited or forfeitable, regardless of intent. This, upon the principle that a party is presumed to know the law and will not be heard to plead ignorance of the law, and that the guilty knowledge is only required to be shown as the basis for a criminal proceeding.

That the provisions of this section 3082 are strictly penal is obvious. The Supreme Court has held, in *Stockwell vs. The United States*, 13 Wall. 551, that the design of this act was to punish as a crime that which before had subjected its perpetrator to civil or *quasi* civil liability, and that it is cumulative in its character to other provisions of law which had previously existed, rather than substitutionary.

Whatever may be the correct view of this question, namely

the necessity of proving actual fraud or guilty knowledge for the purpose of obtaining ultimately a judicial adjudication of forfeiture, these conclusions under the various provisions of law referred to, seem to me, after careful reflection, unavoidable; that this article was dutiable; that its importation through the mails was absolutely forbidden, and therefore unlawful, though the intent of the sender was innocent; that by express provision of law, because it was dutiable, and because of the manner in which it was sent, it became the duty of the proper officer, on arrival of the article at destination, to seize it, it being then only essential, to justify the seizure, that he had reasonable cause to believe it to be subject to duty, or to have been unlawfully introduced into the United States; that the seizure being effected, the law made the seizing officer the custodian of the property; that by further express statutory provisions, the owner could only reclaim it by payment of the appraised value, or appeal to the Secretary of the Treasury for relief; and that as the property was seized in conformity with law, and therefore came lawfully into possession of the seizing officer, there was not the wrongful conversion essential to personal liability.

Counsel for plaintiff has called attention to section 3058 of the Revised Statutes, which provides that "all merchandise imported into the United States shall * * * be deemed and held to be the property of the person to whom the merchandise may be consigned, any sale, transfer or assignment, prior to the entry and payment of the duties on such merchandise * * * to the contrary, notwithstanding"; and upon this provision it is urged that the title of Mrs. Von Cotzhausen has not been divested; that she is the owner of the property, and therefore entitled to possession. But by the express terms of this provision, the ownership is thus declared for the purpose of enforcing payment of duties, and the evident purpose of the provision is, to preserve the

same liability to payment of duty in case of a sale or transfer of the property as existed under the original ownership; and further, there is nothing in this section which is inconsistent with other provisions giving power of seizure even as against the original owner. If the property is dutiable, and has been imported contrary to law, and is consequently liable to seizure, it would not follow from the fact of ownership that the owner would be entitled to possession.

It is further contended that section 3082, which declares that if any person shall fraudulently or knowingly import into the United states any merchandise contrary to law, such merchandise shall be forfeited, was not intended to embrace a mailable article such as that in question, and sent for the purposes here disclosed, but was intended to embrace only merchandise designed for the market. I do not think the section can be so construed. It comprehends any merchandise imported contrary to law, and is not limited to merchandise sent or received for sale. And as the term "merchandise" means any article which is the object of commerce, or which may be bought or sold in trade, it is plain that the article in question is an article of merchandise. Moreover, by section 2766, it is declared that "the word 'merchandise,' as used in this title may include goods, wares and chattels of every description, capable of being imported."

Attention has been called to the sections of the Revised Statutes 3875, 3876, 3877 and 3878, defining mailable matter and dividing it into classes: Mailable matter of the third class including flexible patterns and samples of merchandise not exceeding twelve ounces in weight. But this, as I understand it, has reference to inter-state mail matter, and is not intended to permit the transmission of articles therein enumerated, which are subject to duty, through the mails, from a foreign country, in disregard of the provisions of the Postal Union Treaty, and of the regulations for its enforce-

ment. And the force of this observation is apparent, when it is noticed that some of the articles designated in section 3878, as third class mail matter, are by the law imposing customs duties, made dutiable. So, too, I do not think that section 3895, which provides for the return to the owner or sender of letters, packets or other matter which may be seized for violation of law, was intended to be applied to dutiable articles sent through the mails from a foreign country, and the sending of which is forbidden by the Postal Union Treaty. Section 3991 provides among other things, that "all laws for the benefit and protection of customs officers making seizures for violating revenue laws, shall apply to officers making seizures for violating postal laws."

Authorities were cited on the part of the plaintiff to the effect that where there are serious ambiguities in the statute, the construction should be in favor of the importer, and that duties are not imposed upon a doubtful interpretation. But I do not find the article in question dutiable upon a doubtful interpretation of the statute.

Among the cases cited, is that of the *United States vs. Thomas*, 2 Abb. U. S. Rep. 116, in which it was held that no penalty or forfeiture is incurred or can be enforced, simply because the duties on imported goods are not paid or accounted for before the importation is complete, and that it is by acts or omissions subsequent to the importation that forfeitures and penalties are incurred. The court, however, expressly except from the operation of this undoubtedly correct general principle, the case where some law expressly declares the importation itself, or the manner of making it, unlawful. And it is the manner in which the article here was sent, it being dutiable, which the regulations of the treaty expressly forbid.

Judgment will be entered in favor of the defendants.

This judgment was affirmed by the United States Supreme Court at its October Term, 1882. [*Reporter.*

GEORGE P. WILLIAR *et al.* vs. JOHN W. IRWIN.

CIRCUIT COURT—DISTRICT OF INDIANA—NOVEMBER, 1879.

1. PARTNERSHIP—SCOPE OF BUSINESS—ESTOPPEL—LIABILITY ON CONTRACTS.—If one member of a firm of millers permits his co-partner to hold the firm out to the world as dealers in grain, and knowingly allows cards and letter heads to be used indicating such business, he will be liable with his co-partner on contracts for the sale or purchase of grain for future delivery, though such contracts are made without his actual knowledge, by his co-partner in the firm name.

2. WAGER CONTRACTS—BOTH PARTIES MUST CONCUR—BOARD OF TRADE.—A contract for the sale or purchase of grain for future delivery, legitimate on its face, cannot be held void as a wagering contract, merely by showing that one of the parties so understood it. To render it void it must be proved that both parties regarded it simply a wager on differences.

3. WAGER CONTRACT.—If a purchase or sale of grain for future delivery made in the form of a contract, is in fact simply a bet or wager on differences, the form it assumes does not affect its invalidity.

4. CUSTOM AMONG COMMISSION MERCHANTS—CONTRACTS FOR FUTURE DELIVERY—"RINGING" SETTLEMENTS.—A custom among commission merchants on a Board of Trade by which, if A sells for one of his customers a certain quantity of grain for future delivery to B, who buys the same for one of his customers, and B then for another customer sells the same quantity for like delivery to C, who buys for one of his customers, and C afterwards for another customer sells the same amount for same delivery to A, who buys for another one of his customers—the commission merchants A, B and C can reciprocally surrender or cancel the contracts themselves, adjusting the differences in price, and returning margins, and each substitute his buyer customer and seller customer as parties to the contract, himself guaranteeing the performance of such contract—such a custom is founded in commercial convenience and is valid.

Baker, Hord & Hendricks, and *George A. Knight*, for plaintiffs.

McDonald & Butler, and *Isaac M. Compton*, for defendant.

The following authorities were cited by counsel:

Gregory vs. Wendell, 40 Michigan, 432; *Bailey vs. Bensley*, 87 Illinois, 556; *Oldershaw vs. Knowls*, 4 Bradwell, 63; S. C. 6 id. 325; *Nourse vs. Prime*, 4 Johnson Chancery, 490; S. C. 7 id. 85; *Horton vs. Morgan*, 19 New York, 170; *Stewart vs. Drake*, 46 New York, 450; *Worthington vs. Torrey*, 34 Maryland, 182; *Price vs. Grover*, 40 Maryland, 102.

GRESHAM, J., charged the jury as follows:

This is an action brought by the plaintiffs against the defendant as surviving partner of the firm of Irwin & Davis to recover an alleged balance due from said firm to the plaintiffs.

The transactions out of which it is claimed this balance grew were certain sales of wheat for future delivery claimed to have been made by the plaintiffs as commission merchants at Baltimore for Irwin & Davis on the order of this firm.

The defenses are,

First—That the alleged sales of wheat were not within the scope of the partnership business of Irwin & Davis; that they were the individual transactions of Davis with the plaintiffs; and

Second—That the sales were wagering contracts and void.

And first, were the transactions out of which grew the alleged balance due to the plaintiffs, within the scope of the partnership business of Irwin & Davis?

Irwin & Davis were partners in the purchase and manufacture of wheat into flour. To this extent the defendant Irwin admits that there was a partnership. He testified that the partnership was limited to this, and that his partner, Davis, who managed and carried on the business, had no authority to buy and ship grain to Baltimore or elsewhere

on the firm account. The firm of Irwin & Davis was formed, Irwin says, as early as March, 1873, and it existed under the active management of Davis until his death in October, 1877. It is not denied that during all this time Davis did buy and ship grain to some extent in the firm name. Necessary conveniences existed in connection with the mill, for the loading of grain into cars for shipment. The letter and bill heads of the firm during all this time were "IRWIN & DAVIS, MILLERS AND GRAIN DEALERS, BRAZIL, INDIANA," and Davis regularly entered upon the books of the firm, transactions in the purchase and shipment of grain.

If you believe that the purchase and sale of grain was within the apparent scope of the partnership, and the parties dealt with Irwin & Davis in good faith, believing they were dealing with the firm, then the firm became liable for such transactions.

If Irwin permitted Davis to hold himself and Irwin out to the world as partners in the business of dealing in grain, he became liable with Davis on contracts for the sale and purchase of grain for future delivery, and in that case it is not material that Irwin should have actual knowledge of particular sales or purchases in the firm name. And if Irwin knew that Davis was holding the firm out as dealers in grain, and did not protest or give public notice to the contrary, he is responsible as partner for all contracts made by Davis in the firm name, within the apparent scope of the business of dealing in grain. If Davis, as partner, did in fact buy and sell grain, and if in his correspondence with customers and others, including the plaintiffs, he employed printed letter heads or cards representing the firm of Irwin & Davis as grain dealers; this was a holding out of that firm as a partnership engaged in that business, and if before or at the time of the dealings with the plaintiffs, Irwin knew that

the firm was thus held out as grain dealers, he is liable as a partner.

If therefore, you believe from the evidence, that Irwin & Davis held themselves out as dealers in grain, as well as in flour, and that plaintiffs dealt with Davis, supposing they were dealing with the firm, and in so doing advanced them any money in fulfilling such contract, you should find for the plaintiffs in whatever sum the evidence may show them to be entitled to on account of such advancements, unless you think the defendant has shown that the transactions between the plaintiffs and Irwin & Davis were gambling transactions.

If you find that the dealings with the plaintiffs were within the scope of the partnership, you will next consider whether the dealings were gambling transactions.

The burden of showing that the parties were carrying on a wagering business and were not engaged in legitimate trade or speculation rests upon the defendant. On their face these transactions are legal, and the law does not, in the absence of proof, presume that parties are gambling. A person may make a contract for the sale of personal property for future delivery which he has not got. Merchants and traders often do this. A contract for the sale of personal property which the vendor does not own or possess but expects to obtain by purchase or otherwise, is binding if an actual transfer of property is contemplated. A transaction which on its face is legitimate cannot be held void as a wagering contract by showing that one party only so understood and meant it to be. The proof must go further and show that this understanding was mutual—that both parties so understood the transaction. If however at the time of entering into a contract for the sale of personal property for future delivery, it be contemplated by both parties that at the time fixed for delivery the purchaser shall merely re-

ceive or pay the difference between the contract and the market price, the transaction is a wager and nothing more.

It makes no difference that a bet or wager is made to assume the form of a contract. Gambling is none the less such because it is carried on in the form or guise of legitimate trade. It is not sufficient for the defendant to prove that Irwin & Davis never understood they were to deliver wheat in fulfillment of the sales made for them by the plaintiffs. The presumption is that the plaintiffs expected Irwin & Davis to execute their contracts—expected them to deliver the amount of grain sold, and before you can find that the sales were gambling transactions and void, you must find from the proof that the plaintiffs knew or had reason to believe that Irwin & Davis contemplated nothing but a wagering transaction, and acted for them accordingly.

If the plaintiffs made sales of wheat for Irwin & Davis for future delivery, understanding that these contracts would be filled by the delivery of grain at the time agreed upon, Irwin & Davis are liable to the plaintiffs, even though they meant to gamble and nothing more.

The testimony tends to show that a general custom obtained among grain commission merchants in Baltimore to the following effect:

When one commission merchant upon the order of a customer, sells to another commission merchant a quantity of grain for future delivery, and it occurs that at some other time before the maturity of the contract the same commission merchant receives an order from another customer to purchase the same or a larger quantity of the same kind of grain, for the same future delivery, and he executes this second order by making the purchase from the same commission merchant to whom he had made the sale in the other case, that then in such case the two commission merchants meet together and exchange or cancel the contracts as be-

tween themselves, adjusting the difference in the prices between the two contracts and restoring any margins that may have been put up; and that from that time forth, the first commission merchant holds for the benefit of the customer for whom he sold the order or contract of the purchaser for whom he bought, so that the grain of the selling customer may, when delivered, be turned in on the order or contract of the purchasing customer, and that the commission merchant is held responsible as guarantor to his customer.

The evidence also tends to show a custom obtaining among commission merchants in Baltimore to the further effect that though the second transaction may have been had with a different commission merchant from the one with which the first transaction was had, yet where it can be found that a series of contracts are in existence for the sale of like grain, for like delivery, so that the seller owes the wheat to the buyer to whom he sold, and he to another, who owes like wheat for like delivery to the first commission merchant, that then, in such case they settle by what they call "a ring" —that is, they all reciprocally surrender or cancel their contracts, adjust differences in price between themselves, and surrender all margins that have been put up; that in all such cases the commission merchant substitutes the contract of another customer in place of that with the commission merchant whose contract has been cancelled or surrendered; and that he guarantees to his customer the performance of the contract originally made in his behalf.

I say to you gentlemen that these customs are founded in commercial convenience; that they are not in contravention of the law, and that they are valid.

In determining what the intention of the parties was in these transactions, you will carefully weigh all the evidence. Henry D. Williar, one of the plaintiffs, testifies that the plaintiffs expected Irwin & Davis to execute their contracts by

delivering the amount of wheat sold. It seems that the plaintiffs sold for Irwin & Davis, for delivery in about two and a half months, 165,000 bushels of wheat. Did Irwin & Davis expect to deliver this amount of wheat within this time? Did the plaintiffs expect Irwin & Davis to enable them to deliver this amount of wheat within the time fixed for delivery?

In this connection you will consider the previous dealings between Irwin & Davis and the plaintiffs, the ability of Irwin & Davis to engage in transactions of this magnitude, and the opportunity which the plaintiffs had had to know the extent or character of the business of Irwin & Davis and their financial standing and ability, and the importance of Baltimore as a grain market.

There remains a set-off, gentlemen, and if you find that, in legitimate dealings between the firm of Irwin & Davis and the plaintiffs, there was a balance in the hands of the plaintiffs, which balance was exhausted by Davis in keeping up margins in gambling transactions, the set-off will not avail the defendants. A man cannot recover back money which he loses in gambling transactions any more than he can enforce a gambling contract.

If you find that the plaintiffs are entitled to recover from the defendant, then it will be in your discretion to allow the plaintiffs interest. If you think, under all the circumstances, they are entitled to interest on all sums advanced for Irwin & Davis, it is in your discretion to allow interest or not.

Verdict for plaintiffs for $17,622.78.

Consult also *Jackson vs. Foote*, *post*, 123 and Reporter's note thereto. [*Reporter.*

WILLIAM PORTER vs. CITY OF JANESVILLE.

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—SEPTEMBER, 1880.

1. FEDERAL JURISDICTION—NEGOTIABILITY OF MUNICIPAL BONDS.—A municipal bond under seal, which is in form a simple acknowledgment of indebtedness, and an unconditional promise to pay a certain sum of money at a certain time can be assigned so as to enable the assignee to bring an action in the Federal Court.

2. NOTES AND BILLS—WORDS OF NEGOTIABILITY.—The word "bearer" or "order" is not essential to the negotiability of commercial paper. Other words may be used rendering it transferable.

Demurrer to complaint.

Wm. Ruyor, for plaintiff.

Ed. F. Carpenter, E. M. Hyzer and *John Winans*, for defendant.

BUNN, J.—This action is brought by the plaintiff, who is a citizen of Massachusetts, against the city of Janesville, in Wisconsin, to recover the amount of a certain bond for the sum of $1,000 and interest, issued by the defendant to the Rock River Valley Railroad Company, a corporation in Wisconsin, and assignor to the plaintiff.

The following is a copy of the bond:

UNITED STATES OF AMERICA, STATE OF WISCONSIN.
JANESVILLE, July 1, 1853.

$1,000. Janesville Scrip. No. 47.

This certifies that the city of Janesville is indebted to the Rock River Valley Union Railroad Company in the princi-

pal sum of $1,000, payable to said company or its assigns at the end of 20 years from the first day of July, 1853, with interest at the rate of 8 per cent. per annum, payable semi-annually in the city of New York, on delivery of the interest warrants hereto annexed, as they shall respectively become payable, until said principal sum is fully paid. In testimony whereof, and pursuant to a vote of the common council and citizens of the city of Janesville, in a city meeting duly notified and held for that purpose, I, A. Hyatt Smith, mayor of said city, hereunto subscribe my name, and cause the seal of said city to be affixed.

Dated at Janesville, July 1, 1853.

Subscribed and sealed this first day of August, 1853.

By A. Hyatt Smith, Mayor.

Countersigned by J. W. Hobson, Treasurer.

Annexed to the bond set out in the complaint are 40 coupons, for the payment of semi-annual interest, in this form:

INTEREST WARRANT FOR FORTY DOLLARS.

On the first day of July, 1873, the city of Janesville, Wis., will owe and will pay to the Rock River Valley Union Railroad Company, or bearer, $40, being for the half year yearly interest on city certificate No. 47, for $1,000, payable in the city of New York. J. W. Hobson, Treasurer.

The defendant demurs to the complaint, and the point relied upon is that the Rock River Valley Union Railroad Company, being a Wisconsin corporation, could not assign the bond to a citizen of Massachusetts so as to enable him to bring an action in this court; and the question presented is whether the bond in suit is a promissory note, negotiable by the law merchant, within the intent and meaning of section 1, c. 137, of the act of March 3, 1875, defining the jurisdiction of circuit courts.

It is contended by the defendant—*First*, that the instru-

ment sued on is a bond and not a promissory note; *second*, that, if a note, it is not negotiable by the law merchant, it not containing the words "bearer" or "order."

In regard to the first point, sealed instruments of this character, providing for the payment of money at a future time, certainly have in this country, with few exceptions, been held promissory notes rather than specialties. In fact, the instrument in suit answers every definition and requisite of a promissory note by the law merchant.

It is not in form a bond, but it is a simple acknowledgment of indebtedness, and a promise to pay a certain sum of money at a time certain, without condition. And that is just what a promissory note is.

It was not the intention or object of the statute to except promissory notes and bills of exchange by name, but to except commercial paper that is negotiable by the law merchant; and the words "promissory notes" and "bills of exchange" were intended to include all negotiable paper, by whatever technical name it might be known.

Municipal bonds of this character have always been held commercial paper by the United States Courts, and it never could have been the intention of Congress to distinguish between these and ordinary notes and bills, giving jurisdiction in one case and not in the other.

The other point, that the instrument is not in form negotiable, is not tenable. Though the words "bearer" or "order" are more commonly used to denote an intention to make a note transferable by delivery or indorsement, they are by no means essential, and any other words, evincing such an intention, are equally efficient for such a purpose. The words "or its assignees," used in the instrument, undoubtedly rendered the note capable of being negotiated, the same as though the words "or order" had been used. They show an intent to render them transferable from person to

person. The fact of coupons being annexed for the payment of semi-annual interest running to bearer, these being part and parcel of the bond itself, confirms this view, and evinces a like intent to place the bonds on the market as commercial paper. Indeed, the purpose of their issue being to aid in the construction of a railroad, and to raise money for that purpose, they would be of very little use to effectuate that object if they could not be transferred. See *City of Lexington vs. Butler*, 14 Wall. 282, 293; *Brainerd vs. N. Y. & H. R. R. Co.*, 25 N. Y. 496; 3 Kent's Com. 77; Story on Notes, (7th ed.) Pars. 43 and 44, and cases cited; Daniels on Negotiable Instruments, Par. 1146; *Klauber vs. Biggerstaff*, 47 Wis. 551.

The case of *Gregg vs. Weston*, 7 Biss. 360, denying the jurisdiction of this court, is not in conflict with this view, as that case turned upon the construction of the Indiana statute which provides in effect that unless a note is made payable to order, or bearer, at a particular bank, whatever equity the maker is entitled to against the payee he may assert against any indorser; which means, of course, that a note is not negotiable in that state unless payable to order or bearer at a bank. In such a case it seems quite clear that an indorser could not derive jurisdiction to sue in the United States courts by assignment, as such a note is not negotiable by the law merchant.

Demurrer overruled.

In re JORGEN BJORNSTAD.

DISTRICT COURT—WESTERN DISTRICT OF WISCONSIN—JANUARY, 1881.

IN BANKRUPTCY.

COMPOSITION PROCEEDINGS—DISCHARGE OF BANKRUPT.—Composition proceedings in bankruptcy confirmed by the court, constitute a discharge of the bankrupt, within the meaning of section 5116 of the Revised Statutes, relating to the second discharge of a voluntary bankrupt.

Application for discharge.

Rufus B. Smith, for bankrupt.

H. M. & H. A. Lewis, for opposing creditors.

BUNN, J.—From the stipulation of facts in this case it appears that the bankrupt filed his voluntary petition in bankruptcy, and was duly declared a bankrupt, and has paid a fraction over 15 per cent. of his debts, but has obtained the consent in writing of a majority in number and value of his creditors to his discharge. It also appears that on a former occasion, in 1877, and prior to the filing of the petition and adjudication in this case, the bankrupt and one Martin Madson, as copartners, doing business under the firm name of J. Bjornstad & Co., filed their voluntary petition in this court to be declared bankrupts, and under and as a part of the proceedings in that case they had obtained a composition with their creditors, which was confirmed by order of the court on April 10, 1877.

The question now, on this application for a discharge, is

whether the case comes within the provision of section 5116, Revised Statutes which is that "no person who has been discharged, and afterward becomes bankrupt on his own application, shall be again entitled to a discharge, whose estate is insufficient to pay 70 per centum of the debts proved against it, unless the assent in writing of three-fourths in value of his creditors who have proved their claims is filed at or before the time of application for discharge."

It is claimed by the bankrupt that he has never been "discharged" within the meaning of the provision; but I am satisfied he has. The effect of the composition proceedings was to discharge him from all his debts—as well those in favor of his creditors who were opposed to the composition as of those in favor of it. It is true, the discharge came by operation of law, and as the effect of the composition proceedings, rather than by any formal order of the court. But the result is the same. He was discharged from his debts, as a result of the bankruptcy proceedings, as certainly as though no composition had taken place, and he had been discharged by an order of the court at a later stage of those proceedings.

The purpose of section 5116 is to impose a stricter and additional requisition as a condition of a discharge in a case when the bankrupt coming in voluntary, and filing his petition, has once before had the benefit of the bankrupt law, and by virtue of it been discharged from his obligations.

In such case, unless he pay 70 per cent. of the proved debts he must obtain the consent of three-fourths in value of the creditors. The provision is a reasonable one, and in my judgment applies as certainly in a case like this as where the former discharge was by order of the court. If he now obtains a discharge it will be his second discharge from all his debts by virtue of the bankrupt law.

The application for discharge is denied.

JOHN BATES vs. UNITED STATES.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1881.

1. CRIMINAL LAW—SENDING BY MAIL NON-MAILABLE MATTER—SUFFICIENCY OF DESCRIPTION IN INDICTMENT.—In an indictment under Section 3893 of the Revised Statutes, which relates to the sending of non-mailable matter through the mails, it is sufficient to describe the particular book, paper, pamphlet, etc., so as to identify the same without setting forth in language what was contained in the book; and then allege in the language of the statute that it was of the character there described.

2. FICTITIOUS NAME.—The mailing of non-mailable matter to a real person under a fictitious name comes within the meaning of the statute.

3. INDICTMENT FOR SENDING PILLS TO PREVENT CONCEPTION—USELESSNESS NO DEFENSE.—Where pills were sent in answer to a letter asking for something to prevent conception, with the statement that they were just what the writer wanted, the fact that such pills would not answer the purpose, is no defense to an indictment under this statute.

4. BY WHOM MAIL DEPOSITED.—The non-mailable matter need not have been deposited in the mail by the defendant in person; if he authorized it, that is sufficient to sustain conviction.

5. CIRCUIT COURT MAY ALTER SENTENCE.—Although the Circuit Court, upon writ of error, may affirm the rulings of the District Court in a criminal case, yet it is not obliged to impose the same sentence; and if it appear that the penalty inflicted by the District Court was not in conformity to law, the Circuit Court may award execution in accordance with its own opinion as to the degree of punishment warranted by the facts apparent upon the record.

Error to the District Court.

Osgood & Riggle and *Frank Baker* for plaintiff in error.

Joseph B. Leake, District Attorney, for the United States.

DRUMMOND, J.—This was an indictment against the plaintiff in error, charging him with violating different

provisions of section 3893 of the revised statutes. He was found guilty by the jury and sentenced to fine and imprisonment. A motion in arrest of the sentence on account of the insufficiency of the indictment was made in the District Court, and the refusal of the court to grant the motion is one of the principal errors relied on in this court. The section of the statute referred to, as amended by the act of July 12, 1876, declares the following shall be non-mailable matter: any book, pamphlet, picture, paper, writing, print, or other publication which is obscene, lewd, lascivious, or indecent, or any article or thing designed or intended for the prevention of conception, or procuring abortion, or any article or thing intended or adapted for any indecent or immoral use, or any written or printed card, circular, book, pamphlet, advertisement or notice of any kind giving information directly or indirectly where, or how, or of whom, or by what means any of these matters, articles or things before mentioned may be obtained or made, or any letter upon the envelope of which, or postal card upon which, indecent, lewd, obscene, or lascivious delineations, epithets, terms or language may be written or printed; and any person who shall knowingly deposit, or cause to be deposited, for mailing or delivery, anything declared to be non-mailable matter, is deemed guilty of a misdemeanor, and liable for every offence to a fine or imprisonment at hard labor, or both.

One of the counts of the indictment charges the defendant with sending by mail a book, the title of which is given, and it is alleged that it was of so indecent and obscene a character that it was improper to state its contents. Various other counts of the indictment allege that a letter addressed to a particular person, naming him, contained indecent matter. Other counts state that circulars were sent by mail from and to a place named and to a particular person, naming him, giving information where the article referred to (to prevent

conception) could be obtained. The main ground of objection to the various counts of the indictment is that they do not set forth in language what was contained in the book, in the letters, or in the circulars. It is said that whether a book, or letter, or circular is within the terms of the law is a legal conclusion, and the court must be permitted to judge by the use of the special language, or if the case be a picture, or representation, or article, by a copy or description of the same. I think this objection is not well taken. The object of the law is to exclude certain articles from the mail,—if a book, pamphlet, picture, representation, or article, it is sufficient as to that to describe it so as to identify it, or by stating to whom it was addressed, and then to allege that it is within the terms of the statute, as that it is an obscene book, pamphlet, paper, print, picture, or otherwise, or an indecent thing. This is a rule which has been established by the Supreme Court of the United States in relation to offenses against the statute which prohibits interference with or the opening of letters entrusted to the mail by persons other than those to whom they are addressed, (*U. S. vs. Mills*, 7 Peters 138); so that I think it is sufficient, in an indictment under section 3893, to describe the particular book, paper, pamphlet, etc., so as to identify the same, and then allege, in the language of the statute, that it was of the character there described. Consequently a count which declares that the plaintiff in error caused to be deposited in a post-office of the United States, (naming it,) for mailing and delivery to the address of a certain person, (naming it and him,) an envelope then and there containing a printed advertisement and written letter, which together were then and there a notice giving information where, how, and of whom might be obtained an article (naming it) designed and intended for the prevention of conception, was sufficient.

An objection was also taken because these various

communications were sent through the mail in consequence of what are called "decoy letters," addressed to the plaintiff in error. The fact was that a detective of the postoffice department did send letters to the plaintiff in error under fictitious names, but he was requested to send the communications under fictitious names, and they were received by the detective under these various names. It was the case, therefore, where a person used another name to cause a communication to be sent by the mail to him under that name, and such communications were accordingly so received. They were, therefore, communications sent to a real person under a fictitious name, and of course it was as much an offense under this statute for the plaintiff in error to cause non-mailable matter to be deposited for mailing as though there had been no fiction in the case.

It is also objected that the District Court erred in admitting testimony relating to an article transmitted by express. That testimony was admitted on the assumption that it was sent by the plaintiff in error in answer to a letter addressed to him, and simply for the purpose of explaining the facts connected with the offenses charged in the indictment, and not as constituting an offense in itself; which, of course, it was not, under this statute. This testimony was received, under proper caution to the jury, with a statement explanatory of the reason why and for what it was admitted, and I think could not have prejudiced the jury against the defendant.

It was also objected that the District Court refused to allow the defendant to prove that certain pills which were sent by mail would not, of themselves, prevent conception or procure abortion. I think the ruling of the District Court was correct upon that point. The language of the statute is not that the article must necessarily procure abortion or prevent conception, but that it is designed or intended to

procure the one or to prevent the other; and these pills were sent in answer to a letter asking for something which might have that effect, and they were sent with the statement that they were just what the writer wanted.

It is further objected that the deposit of the book, letters, circulars, etc., in the mail was not done by the plaintiff in error himself, but by another person. The language of the statute shows clearly that it was intended to prevent any one from violating the law by another as well as by himself, and the jury were specially instructed by the District Court that they must be satisfied that the act done was authorized by the plaintiff in error; in other words that he caused it to be done through another.

The District Court was requested by the plaintiff in error to give numerous instructions which in terms were refused by the court, but the court instructed the jury generally upon the law of the case, and so far as there was anything material in the instructions asked for in favor of the plaintiff in error which the law justified the court in giving, they were given by the court, and I cannot see that there was any error in this respect. On the whole, I am of opinion that the judgment of the District Court must stand and be affirmed as to the rulings made during the trial.

This being so, it is insisted by the district attorney that this court cannot change in any way the punishment which was imposed upon the plaintiff in error by the District Court; but in proceeding to pronounce final sentence and to award execution, this court must follow the precise terms of the conviction in the District Court. I am not of that opinion. The language of the third section of the act of March 3, 1879, relating to this subject, is as follows: "And in case of an affirmance of the judgment of the District Court, the Circuit Court shall proceed to pronounce final sentence and to award execution thereon."[1] If this court must adopt the terms of

[1] Supplement to U. S. Revised Statutes, 1874–1881, page 452.

the conviction of the District Court, it is where the judgment of that court is affirmed, not only as to the rulings made during the trial of the cause, but also as to the sentence. The first section of the statute describes the cases in which a writ of error will lie—where the sentence is a fine of $300 or imprisonment. In such case the party aggrieved by a decision of the District Court may tender his bill of exceptions. I think one object of the statute was to give to the Circuit Court authority, not only over the rulings of the District Court during the trial, but also over the degree of punishment imposed upon the party if, upon the whole record before the Circuit Court, it should appear in the judgment of the court that the penalty was not in conformity with law; as where a fine was imposed when the statute authorized imprisonment only, or imprisonment where it authorized a fine only, or otherwise was unlawful, or where it was too lenient or too severe. In all these cases I think the opinion of the District Court is subject to review by the Circuit Court, and may be changed. It is not necessary to decide whether the Circuit Court might alter the degree of punishment upon facts which might be established in the Circuit Court, but did not appear in the record. It is sufficient in this case that, upon the facts apparent upon the record as to the degree of punishment imposed, the opinion of this court differs from that of the District Court; and this court will proceed, therefore, to pronounce final sentence, and to award execution in conformity with its own opinion as to the degree of punishment which should be imposed upon the party convicted.

That the defendant in case of indictment under this statute cannot show that the article would not in fact prevent conception, see also, *United States* vs. *Bott*, 11 Blatchford, 346.

In *United States vs. Whittier*, 5 Dillon, 35, it was held that the sending of a sealed letter, written by the defendant, to a fictitious person, in answer to a decoy letter, and which on its face gave no information of the prohibited character, but only by reference to the decoy letter, was not within the statute.—[REPORTER.

NATIONAL FEATHER DUSTER COMPANY vs. SUSAN M. HIBBARD *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1881.

IN EQUITY.

1. PATENT LAW—ESTOPPEL—INVENTION.—Where a wife allowed third parties to deal with her husband as the inventor of a device who is entitled to a patent therefor, and they have advanced necessary expenses to obtain the patent, and purchased the same from him, she will be estopped to claim afterwards that she and not her husband was the inventor of the device and entitled to the patent.

2. EXPERIMENTS—SUGGESTION—INVENTION.—A husband was experimenting with a view to making an improvement in feather dusters, and adopting a suggestion of his wife as to a certain device, produced a successful duster. *Held*, that the suggestion did not make the wife the inventor.

Sleeper & Whiton, for complainant.

West & Bond for defendants.

BLODGETT, J.—This is a bill in equity, framed under Sec. 4918 of the Revised Statutes of the United States for the purpose of setting aside and declaring void a patent issued by the United States to Susan M. Hibbard for "an improvement in feather dusters," dated May 30, 1876, and numbered 177,933, upon the ground that the patentee, Susan M. Hibbard, was not the inventor of the device described in, and covered by, the patent.

The complainant claims to be the owner of patent No. 154,985, issued by the United States on the 15th of September, 1874, to William H. Curwin, Charles J. Sauter and

William W. Clark, as assignee of George W. Hibbard, for "an improvement in feather dusters"; and charges that George W. Hibbard is the husband of the defendant, Susan M. Hibbard, and that after the said George had made the invention, described in the letters patent No. 154,985, and before the issue of his patent he sold and assigned his invention, and his right to a patent thereto, to the parties named therein, to-wit: Curwin, Sauter and Clark, and the patent was duly issued to them as assignees of George W. Hibbard, and that after Hibbard had made the invention described in his patent, and sold the same, as stated, he and the said Susan M. Hibbard, his wife, colluded together to obtain the letters patent, which were issued to her, upon the pretext and false assumption that she was the real inventor of the device covered by the first issued letters patent. And the bill prays that the patent so issued to Susan M. Hibbard, in violation of the exclusive rights of the complainant in the invention therein described, may be canceled and set aside.

The peculiar feature which characterizes both these patents is a feather duster made of turkey feathers, or the feathers of our ordinary domestic fowls adapted to such purpose, made pliable by removing the pithy part, or body, from the stem of the feathers, so as to adapt the feathers more perfectly to such use, when combined with the other elements, to form a duster or brush.

The proof in this case shows conclusively that Mrs. Susan M. Hibbard knew of the fact that her husband had applied for a patent upon this device; knew also that he was poor, and unable to pay the expense of obtaining a patent, and that he made the bargain with Curwin and Sauter to advance the expenses and obtain the patent on condition that they should become half owners thereof. She also knew of the negotiations between her husband and Clark for the sale of

the other half of the patent, and made no objection to the negotiation, and knew that her husband was to receive what was considered very liberal pay for the remaining half of the patent, and the only objection she ever made to the negotiation was that she insisted that the purchase money to be paid by Clark should be given to her; not because she was the inventor, or had anything to do with the invention of the duster, to be covered by the patent, but because her husband, being an improvident man, would squander the money, which she wished to use in the purchase of a home for the family. During all the negotiations between her husband and Curwin and Sauter, and her husband and Clark, she never claimed or pretended, or by any conduct on her part insinuated that the invention was in any degree her own, but allowed these men to invest their money in the procurement of the patent, and Clark to pay for the unsold half of the patent, upon the understanding, to which she seems to have been as fully a party as her husband, that he was the inventor of the duster to be covered by the patent. It seems to me that the proof shows that Mrs. Hibbard, in allowing her husband to deal with Curwin, Sauter and Clark, as the original and first inventor of this device has so far conceded, or admitted him to be the original inventor thereof, as that she should be estopped from now claiming otherwise, and especially claiming that she, and not her husband was the inventor. If there were no other feature in the case, therefore, than the conduct of Mrs. Hibbard toward the persons with whom her husband dealt, I should think it enough to cancel this patent subsequently issued to her.

But the case is, perhaps, susceptible of solution upon another ground. It appears from the proof that George W. Hibbard for some time prior to the alleged invention described in his patent, had been engaged in the manufacture of dusters from turkey feathers, by setting them in their

natural condition into a handle, so as to make a brush or duster; that some little time prior to the 10th of February, 1874, he conceived the idea of making a better duster by softening the stems of turkey feathers and rendering them more pliable, so as to make a feather duster which would supersede or take the place of dusters then and theretofore made from ostrich feathers; his idea being that if he could make turkey feathers or the feathers of our common fowls pliable, he could use them in place of foreign feathers, and make as good, if not a better duster. He experimented some time in this direction with chemicals, for the purpose of softening the stem or rib of these feathers, and not succeeding to his satisfaction in any of these experiments, was discussing the subject on one occasion with his wife, when she suggested to try cutting or shaving down the stem of the feathers so as to make them pliable and limber. The suggestion was at once acted upon and a duster made which proved satisfactory, and the patent issued to his assignee was obtained for this device as the invention of George W. Hibbard.

Mrs. Hibbard's sole claim to the invention covered by her patent, which is the same as that covered by the patent of her husband, is that the suggestion or idea of cutting or trimming these feathers down so as to make them limber, first came from her, and upon this fact she claimed and obtained the patent in controversy.

The specification and claims in the two patents are substantially the same, and are for "as an improved article of manufacture, a feather duster, having the stems of the feathers split longitudinally and a part thereof severed from the remaining part substantially as specified."

The patent, it will be seen, is for this new article of manufacture, namely, a feather duster made of split feathers. It is not upon split feathers as such, or upon the process of splitting feathers, but upon a combination of the split feathers

with the other elements by which a duster is made. The idea of a feather duster to be made of feathers of the common turkey or other domestic fowls, seems clearly to have originated with George W. Hibbard. The desideratum was to make those feathers pliable. He was seeking to accomplish this when the suggestion was made to him by Mrs. Hibbard to try cutting or splitting them. The proof on the part of Mrs. Hibbard fails to show, indeed it falls far short of showing, that she ever made a feather duster or thought of making one from turkey feathers made pliable by splitting them, until after her husband had been for some time at work in that direction. The most the proof does show is that she suggested the mode of making feathers limber and pliable which were used for the purpose of making the feather dusters described in this patent. The successful feather duster covered by both these patents, was, it seems to me from the proof, the invention of George W. Hibbard. While he was experimenting, I may say, perhaps, groping for some method of rendering his feathers pliable, Mrs. Hibbard suggested the experiment of splitting the feathers; he acted upon that suggestion, and finding that the feathers were thereby made pliable combined them with the other material and made the feather duster which, before that time, had only had existence in his mind. Although Mrs. Hibbard may have made a valuable suggestion in the progress of the experiment, yet that does not make her the inventor.[1]

For these reasons, but mainly upon the ground of the estoppel, which I think the most cogent, the bill of the complainant will be sustained, and a decree entered setting aside the patent issued to Susan M. Hibbard.

[1] *Agawam Co. vs. Jordon*, 7 Wallace, 602; *Pitts vs. Hall*, 2 Blatchford 229.

FRANK KERTING vs. AMERICAN OLEOGRAPH COMPANY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1881.

IN EQUITY.

1. REMOVAL OF CAUSES—AT WHAT TERM OF COURT SUIT CAN BE REMOVED.—A case cannot be removed to the Federal Court from the State Court after the first term of that court at which the cause was at issue and could have been heard or tried in conformity with the law and the practice of the court.

2. NOTICING CAUSE FOR TRIAL—FIRST TERM AT WHICH TRIAL COULD BE HAD.—Where the State Court holds a term each month, and cases are put upon the trial calendar only upon notice and motion of one of the parties when such cause is at issue, the fact that such case is not placed upon the trial calendar until several terms after it was at issue, will not give the right to remove after the first term at which such cause could have been tried.

3. FILING REPLICATION NUNC PRO TUNC—SUPPLEMENTAL TRANSCRIPT.—Where a cause had been removed to the Federal Court and it did not appear by the transcript that any replication had been filed to the answer and that the cause was at issue, it is competent to show by a supplemental transcript that the State Court, subsequent to the filing of the original transcript, entered an order allowing a replication to be filed *nunc pro tunc* as of the date when it was claimed the replication had been originally filed.

Motion by complainant to remand.

C. M. Hardy, for complainant.

Conger & Gorton, for defendants.

DRUMMOND, J. —A motion is made in this case to remand it to the Circuit Court of Cook County. The bill was filed in that court on the twenty-first of October, 1880, and

the process issued in the cause was returned to the November term. Under the law there is a term every month of that court, commencing on the third Monday of each month. The answers were filed to the bill on the sixteenth of November, 1880. On the thirtieth of March, 1881, an order was made by the State Court on the application of the plaintiff, and due notice, that the cause would be set for hearing at the April term next. On the sixteenth of May, 1881, during the April term, and before the cause was heard, an application was made, under the act of 1875, for the removal of the cause to this court upon the proper petition and bond filed. There was at that time filed in this court a record from the State Court; and, sometime since, objection was made that the application for removal had not been made in time, which was then held not to be valid, because, by the transcript from the state court, it did not appear that any replication had been filed to the answer, and that the cause was at issue. Since then there has been a supplemental transcript filed from the State Court, from which it appears that, after this objection was taken in this court, an application was made to the State Court to file a replication, because a replication had been filed on the thirtieth of November, 1880, which had been lost, or could not be found. The court, upon evidence which it deemed satisfactory, allowed a replication to be filed as of that day. The order of the court is a *nunc pro tunc* order, not in form finding that there was a replication filed on the thirtieth of November; but taking the whole proceedings of the court together, with its order upon this subject, it is clear that the court must have been satisfied that there was a replication filed on that day. It is objected by the defendants seeking a removal that the State Court had no right, as this court had obtained jurisdiction of the cause, to make this order; but if it be a fact that the replication was filed on that day, and it was lost or mislaid, there can be no doubt that it

was competent for the court, irrespective of the question of removal, to allow the replication to be supplied by a similar paper. This authority the court had under the statute of this state of March 19, 1872, and probably at common law, independent of the statute. It appears that at the time the cause was set down for hearing, and perhaps before that, some search had been made for a replication and none could be found; and the attention of the court was called to the fact that there did not appear to be any replication among the files of the cause. It is not stated at what precise time search was made by the defendants' counsel for the replication and none was found.

The question involved in the cause, then, is whether under these facts the application for a removal was made in time. We must assume that a replication was filed on the thirtieth of November, 1880. Under the statute of the state upon the subject the cause was then to be deemed at issue and stand for hearing. It was competent for either party to call up the cause for hearing upon oral evidence to be taken in court. Under the statute of the state replications are general, and are to be filed within a certain time after the plaintiff or his attorney has been served with notice of answer filed. Consequently, up to the time when the petition for removal of the cause was filed, there had occurred the November, December, January, February and March terms of the Circuit Court of the State. There should be, perhaps, excluded from this list the month of November, as the replication was not filed until the last day of that month. The third section of the act of 1875 requires, in order to remove a suit from a State to the Federal Court, that the petition for the removal must be filed in the State Court before or at the term at which the case could be first tried and before the trial thereof. This cause had not been heard or tried in the State Court. Could it have been tried before the April term

of the State Court? Unless there is some rule of the State Court which prevented it from being heard before the April term, then it could hardly be said to be within the contingency named in the statute.

The rule in the State Court upon the trial of chancery cases is as follows:

"When any chancery case is at issue, upon notice and motion of either party, a cause, at any time within 10 days of the commencement of a term for which a trial calendar may be ordered made, may be placed on a trial calendar. The cases on such calendar shall be called and tried on Tuesday, Wednesday, Thursday and Friday of each week. No more than five cases shall be fixed for trial on the same day; but if the court is behind in the call of the calendar, not exceeding six cases shall be called for trial any one day. All cases shall appear on the calendar in the order of the notice and motion. All cases remaining undisposed of upon any calendar shall, without further order, be placed at the head of the next (new) calendar."

We have already stated that upon the transcript from the State Court we must assume that the replication was filed to the answer on the thirtieth of November. It was then competent for either party to place the cause on the trial calendar for the term of December, January, February or March. It was not, in point of fact, placed upon the trial calendar until the thirtieth of March, but it could have been by the defendants long before that time, as well as by the plaintiff; and it is difficult to understand, therefore, how, under the circumstances of this case, we can say that this application of the sixteenth of May, 1881, for the removal of the cause to this court, was made to the State Court before it could there be tried. There certainly can be no inference to that effect drawn from what appears to this court. And the result is that the case must be remanded, on the ground that

the application made for removal was too late, within the meaning of the third section of the Act of Congress of 1875.

Cause remanded.

UNITED STATES vs. JAMES A. HAMILTON.

DISTRICT COURT—DISTRICT OF INDIANA—DECEMBER 1881.

1. CRIMINAL LAW—LOCAL MAIL AGENT IS A POSTOFFICE EMPLOYE.—A local mail agent employed by a railroad company to carry the mail-bags to and from the postoffice and the trains, who receives no compensation from the Government, but who takes the usual oath of office for the faithful discharge of his duties, is a postoffice employé within the meaning of section 5467, U. S. Revised Statutes.

2. EMBEZZLMENT OF LETTER UNDER SECTION 5467, REVISED STATUTES.—And if such local mail agent receives a letter handed to him by an individual to be put upon the train outside of the mail-bag, he is intrusted with mail matter within the meaning of the statute and can be indicted for stealing the contents thereof.

This was an indictment under Section 5467, Revised Statutes.

On motion by defendant for new trial.

Chas. L. Holstein, U. S. District Attorney, and *Chas. H. McCarer*, for the United States.

T. S. Rollins and *S. T. McConnell*, for defendant.

GRESHAM, J.—The indictment was based upon Section 5467, Revised Statutes, and charged that the defendant, being a postoffice employé, stole and took out of a certain letter,

which had come into his possession and which was intended to be conveyed by mail, before it had been delivered to the party to whom it was addressed, a certain article of value, describing it. There was a verdict of guilty.

A motion for a new trial is made, upon the ground that the evidence does not show that the letter was legally in the custody of the postal service, or that the defendant came into possession of it in the regular course of his official duties.

It appears from the evidence that the defendant was the local mail agent at the depot at Attica, Indiana, and as such had the care and custody of the mails there. He had taken the usual oath of office for the faithful performance of his duties, but received no compensation from the Government. He was also in the service of the railroad as station agent and telegraph operator at the depot. As local mail agent he received the mail-bags, etc., from, and delivered them to, the trains and was also in the habit of receiving letters from individuals for delivery to the route agents. One Ambrose Rank was the telegraph messenger boy at the depot. He, too, was in the habit of receiving letters from individuals for mailing at the depot and on the trains. The letter described in the indictment was from Nave, Allen & Co., an Attica firm, and was directed to a person at LaFayette, Indiana, and contained a draft for $30. This letter was handed by a member of the firm to young Rank to be mailed at the depot. Rank swore that he delivered the letter, just as he received it, to the defendant at the depot, for mailing on the train. It never reached its destination and was never found. A few days after its delivery to the defendant he disposed of the draft and spent the money at LaFayette. The defendant testified, in his own behalf, that he never received the letter from Rank or otherwise, and that he bought the draft from him for $10. There was evidence tending to corroborate Rank's statement.

It is declared, by the section under which the indictment is drawn, to be an offence for any person employed in any department of the postal service to steal or take any article of value enumerated in the statute from any letter intended to be conveyed by mail, which comes into his possession "either in the regular course of his official duties, or in any other manner whatever," provided the same has not been delivered to the party to whom it is directed. If the defendant received the letter, as testified to by Rank, knowing that it was intended to be conveyed by mail, and that it had not been delivered to the person to whom it was directed, and the defendant opened it and stole the contents, he is guilty. It is not material how a letter which is intended to be conveyed by mail comes into the possession of a person employed in the postal service. A local mail agent, such as the defendant was, who receives a single letter to be delivered to a mail agent to be conveyed to its destination through the mails, is intrusted with mail matter, within the meaning of the statute; and he is just as guilty, if he opens and steals the contents of such a letter, as if he had stolen the contents of a letter taken unlawfully from a mail bag or packet with which he was intrusted.

Motion for a new trial overruled.

W. J. RALPH vs. UNITED STATES.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1881.

1. AFFIDAVIT FOR MATCH-STAMP BONDS—PERJURY—REVENUE LAW.—It was competent for the Treasury Department to make a regulation, that before a match-stamp bond, which shall authorize the delivery of stamps on credit to a manufacturer of matches, shall be accepted, an affidavit shall be made showing the pecuniary responsibility of the sureties; and perjury can be assigned upon such affidavit.

2. GRANTING MOTION FOR NEW TRIAL—DISCRETIONARY.—A motion for a new trial before a District Court is addressed to the discretion of the court, and no error can be assigned for overruling it.

Error to the District Court.

Bisbee & Ahrens, for plaintiff in error.

J. B. Leake, District Attorney, for the United States.

DRUMMOND, J.—Under the provisions of the Internal Revenue Laws of the United States, one Phineas Ayer, in December, 1878, procured a bond with sureties in the sum of $30,000, being an ordinary match-stamp bond, in the form then required by the Commissioner of Internal Revenue, to secure the payment due to the United States for certain internal revenue stamps, to be delivered to Ayer on credit as a manufacturer of matches. As a necessary condition to the acceptance of this bond and of the sureties, the regulations of the Treasury Department required that an affidavit of the surety should be made before some officer qualified to administer an oath, signed by the surety, and setting forth his pecuniary responsibility. Such an affidavit was signed by the plaintiff in error, and by his wife, Matilda S. Ralph,

in this case, before a proper officer. The indictment charges that the plaintiff in error procured his wife to sign the affidavit, and that she committed perjury in signing it. Before the district attorney approved the bond he examined the plaintiff in error and his wife particularly in regard to their property, real and personal. After the bond was executed and the affidavit was sworn to and signed, it was approved by the district attorney of the United States, and was subsequently accepted by the proper officers of the treasury, and revenue stamps to a large amount were issued to Ayer. On the trial of the case before the District Court, the affidavit was offered in evidence, and objection was made on the ground that it was not an instrument required by law to be sworn to, and that therefore a false statement contained therein did not constitute perjury. This objection was overruled by the court, to which exception was taken. It was also shown that the plaintiff in error admitted that he was not pecuniarily responsible, but that his wife was responsible as surety, they both having signed the bond. There was evidence also offered tending to show that the statement set forth in the affidavit, sworn to by the wife of the plaintiff in error, was false as to the value of the real property therein described and as to the title thereto. The plaintiff in error admitted on the trial, by his counsel, that he procured his wife to sign the bond, and that he was responsible for whatever she had done, but denied that she had committed perjury. The counsel of the plaintiff in error, addressing the court, said, in his presence and hearing, "The defendant consents that a verdict of guilty may be rendered by the jury," and the court thereupon said, "Does the defendant so consent?" No objection was made, and the plaintiff in error nodded his head in reply to the question of the court, and a verdict of guilty was then directed to be rendered by the jury, which was accordingly

done in the presence and hearing of the plaintiff in error, without objection or dissent by him.

After the recording of the verdict, a motion was made by the plaintiff in error for a new trial, and several affidavits were filed in support thereof, the principal object of which was, apparently, to show that the declaration of the counsel that a verdict of guilty might be rendered was unauthorized, and that there were several witnesses present whose testimony the plaintiff in error desired to introduce to show that the statements contained in the affidavits were true, and that his counsel was unwilling and declined to call the witnesses and introduce their testimony, relying upon the proposition that the affidavit was not an instrument authorized by law, and, therefore, perjury could not be assigned upon it. It will be seen, therefore, that after the introduction of certain evidence, further evidence was waived, and an admission made by the counsel, in the presence and hearing of the plaintiff in error, of his guilt under the indictment, and a verdict of guilty by the jury was rendered and recorded, as it would seem with his consent openly given in court. The motion for a new trial was addressed to the discretion of the court, and no error, therefore, for overruling it can be assigned. The District Court had the best opportunity of judging of the effect of the affidavits which were filed in support of the motion. It had heard the testimony of all the witnesses on the trial. It had observed the conduct and demeanor of the plaintiff in error during the trial. It was, therefore, better able to judge of the truth of the statements made in the affidavits than this court, and the rule, which has been established by the Supreme Court of the United States applies here, that the opinion of the court upon a motion for a new trial is a matter of discretion, and not error. It is claimed by the plaintiff in error that his rights were sacrificed by the action of his counsel in the District Court. Of that the District Court was a

competent judge, and it is to be observed that the counsel himself, who acted for the plaintiff in error in the District Court, was not heard, and his affidavit was not taken, and, therefore, his statement of the facts, and of the circumstances which operated upon him, is not before us.

He is said to have relied upon a view which he took of the law of the case which he thought conclusive, namely, that there was no statute which required an affidavit of the kind which is the subject of controversy in this case. If that were so, then it was misapprehension, we think, of the law which declares that certain officers of the Treasury Department, as well as the Secretary himself, may make certain rules and regulations relating to the duties of their several offices. There can be no doubt it was competent for a regulation of the kind in controversy here to be made by the proper officer of the Treasury, namely, that before a bond should be accepted, which might authorize the delivery, under the law then in force, of stamps on credit to a manufacturer of matches, an affidavit should be made showing the responsibility of the sureties, and, therefore, this was an affidavit authorized by law; and if the statements contained in it were false, and known to be so by the person making them, then upon it perjury could be assigned. The judgment and sentence of the District Court will be affirmed.

THE BUCKEYE.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1881.

IN ADMIRALTY.

1. COLLISION—WANT OF LIGHTS—NEGLIGENCE.—The fact that a vessel does not have lights burning after sunset as required by law, does not constitute contributory negligence and cannot be set up as a defense to a libel for damages by a collision, unless the want of lights caused or contributed to the collision.

2. NAVIGATION OF CHICAGO RIVER—RATE OF SPEED.—As a rule it is negligence *per se* for a vessel to be moving in the Chicago River, between the Main street bridge and Allen's slip, where the river is extremely crooked, faster than three miles an hour during the season of navigation when the river is crowded with other craft; and whatever be the rate of speed, the vessel should be completely under control, so that she can be stopped or her course changed promptly.

Schuyler & Kremer, for libellants.

W. H. Condon, *R. S. Tuthill* and *Wm. L. Mitchell*, for respondents.

BLODGETT, J.—This is a libel by the owners of the steam canal-boat Montauk, against the steam-propeller Buckeye, for damages by a collision in the waters of the south branch of the Chicago River, between the Buckeye and the Montauk, on the evening of August 19, 1880, whereby the Montauk was sunk, and her cargo proved a total loss to its owners.

Norton & Co. file the libel in their own behalf, as owners of the Montauk, for the damages and demurrage sustained by them as such owners, and also on behalf of the insurance company who had issued a policy to them upon the cargo, and who had paid for the cargo as a total loss.

The claim on the part of the libellants is that the collision was occasioned by reason of the negligent handling of the Buckeye while she was proceeding down the river; while the respondents, the owners of the Buckeye, insist that the collision was wholly occasioned by negligence on the part of those in charge of the Montauk. It appears from the proof, and is undisputed, that the collision occurred in the river near the south line of Allen's slip, where the river is about 130 feet wide from dock to dock; and on the part of the libellants it is claimed that the Montauk was on the west side of the center of the river, and within fifteen or twenty feet of the west bank; while on the part of the respondents it is contended that the Montauk was by reason of the negligence of those in charge of her, in the middle or east of the middle of the river at the time she was struck by the Buckeye.

The undisputed facts in the case are that between seven and eight o'clock of the evening in question, the steamer Buckeye was coming down the river, passing through the west draw of Main street bridge. When in the draw her officers heard a single blast of a whistle from the Montauk, which was then coming up the river, indicating that the Montauk would keep on her starboard side, which was the west side of the river. The Buckeye responded to her whistle, indicating that she would keep upon her starboard side, or the east side of the river going down. The Buckeye kept on down the river, and when just at the south line of Allen's slip, about 700 feet below the bridge, the bow of the steamer struck the port bow of the Montauk about three feet from her stem, injuring her so severely that the Montauk was hauled into Allen's slip, where she sunk within half an hour. It is conceded that the Montauk had no lights displayed at the time of this collision, and it is contended on the part of the respondents that the negligence of the Montauk in not displaying the lights required by law, and also the fact that the Montauk was not

upon her side of the river, or not close enough to her side of the river, caused the collision; and that those in charge of the Buckeye were not guilty of any such negligence as would make her liable.

The law requires vessels navigated by steam to carry the lights required by law in all weathers, between sunset and sunrise. Rule 2, section 4233, Revised Statutes. And it is clearly shown by the proof, in fact admitted, that the collision occurred after sunset, and that the Montauk had no lights.

But it is contended on the part of the libellants that the collision in this case did not occur by reason of the want of lights on the Montauk; that it was still sufficiently light to enable those in charge of the Buckeye to see the Montauk plainly, and to have taken timely measures to have avoided the collision. And it is undoubtedly well settled that the mere fact that the lights were not burning on the Montauk, as required by law, is not a defense here, unless this fact caused or contributed to the collision. *The Tillie*, 13 Blatchford, 514; *The Miranda*, 6 McLean, 221; *The Farragut*, 10 Wallace, 334; *The Dexter*, 23 Wallace, 69; *The Wanata*, 95 United States, 600.

The position of the libellants is that, even if it was after sunset when the collision occurred, it was still light enough so that those on the Buckeye could plainly see the Montauk, and should have seen her in time to avoid a collision; and if they negligently failed to do so, they cannot successfully invoke the fact that the Montauk was violating the statute law in regard to the signal lights. In other words, the question in this case is, does the testimony, when all considered, satisfy the mind that the collision would probably have occurred, even if the lights had been properly set and burning upon the Montauk at the time?

The chief contradictions in the testimony are as to the

precise moment of the collision, and the degree of light at that time; the time in fact being immaterial, except so far as it bears upon the question as to the amount of light at and immediately before the collision. The witnesses on the part of the Buckeye insist, some of them, that it was "pitch dark," others that it was "very dark," and others that it was "thick dusk" at the time the collision occurred. While, on the part of the libellants, the witnesses state that it was "light;" that it was "clear light," "not dark;" that objects like the Montauk could be seen a long distance,—some say a mile, others say half a mile, others say several blocks, but all insisting that it was light enough for those on the Buckeye to have seen the smoke of the Montauk at the time the two boats respectively sounded their whistles for their sides of the river, and when they must have been 900 feet apart. It is possible that, owing to a bend in the river, the hull of the Montauk may not have been visible from the deck of the Buckeye while in the draw of the bridge, but her whistle was heard and her smoke could have been seen.

From a careful review and analysis of this testimony, I have come to the conclusion that it was light enough for those on the Buckeye to have seen the Montauk, long enough before the collision occurred, to have shaped their course so as to have avoided the collision. That it was not "pitch dark" nor "very dark," nor even dim daylight or dusk, is evident from the respondents' own witnesses. Many of them who testify to this intense darkness seem to have been able to observe objects in every direction except that in which the Montauk lay; and even the lookout upon the Buckeye says that when he discovered the Montauk she was 200 feet or more away, and that he did not report her to the captain, who was the officer of the deck, because the captain could see her himself. The river at the place where this collision occurred, for a long distance above and below it, is very crooked, and

it is no doubt incumbent on tugs and other vessels moved by steam to proceed either up or down the river very cautiously. The evidence in the case satisfies me that the Montauk was going quite slowly and the Buckeye going very fast. Those in charge of the Buckeye say she was going from three to five miles an hour. Witnesses differ very much as to the rate of speed of the Buckeye, but the established fact, if anything may be said to be established by this proof, is that the Buckeye proceeded down the river nearly 700 feet after sounding her whistle to indicate which side of the stream she would take, while the Montauk progressed up the stream only about 200 feet in the same time. The witnesses on the Montauk and those upon the shore, or on other vessels in the vicinity, say that she was not going over two miles or two and one-half miles per hour. If her speed was two, or two and one half miles, certainly the Buckeye must have gone over six miles an hour at the time, because she covered within the same time more than three times the distance passed over by the Montauk.

As to the question whether the Montauk was in the middle of the river, or east of the middle of the river, as is claimed by the respondents, I think the preponderance of the proof shows that she was west of the middle of the river. The proof shows that the barge Irish lay upon the west side of the river, just north of the entrance to Allen's slip,—far enough north, so that her jib-boom and forward hamper did not interfere with the entrance to the slip. In going up the river, the Montauk, having in tow the canal-barge Lockport, was obliged, of course, to swing out from the west bank of the river far enough to avoid colliding herself or her tow with the Irish, and this would carry her towards the middle of the river,—the river, as I have said, being about 1130 feet wide. After the Montauk had passed the Irish, she would naturally, as she intended to go through the west or starboard

draw of the Main-street bridge, which she was approaching, hug closely to the west or starboard side of the river, and I can see no evidence that she did otherwise. It is possible that she was very near the middle of the river; because, to avoid the Irish, she would have to swing nearly or quite into the middle of the stream, and she might not have regained the west side, as she had only gone a little more than her length beyond the Irish before the collision, and when her captain saw the Buckeye coming onto her, the wheel of the Montauk was undoubtedly put further to port for the purpose of throwing her still further over to the starboard side of the river; and, from the manner in which the two vessels came together, there can be no doubt, I think, that the bow of the Montauk was bearing towards the west or starboard, so as to present her port bow to the Buckeye. And the proof also shows that immediately after receiving the blow the Montauk swung around crosswise of the river, and the fact that she did thus swing crosswise of the river from the impetus of the blow or collision, convinces me that she received the blow in such a manner as that her bow must have been west of the center of the river; otherwise her stern would have struck the east bank before she swung around squarely across the river. Besides this, I can see no reason or motive for the Montauk being upon the east side of the river. The proof clearly shows, by the testimony of witnesses on both sides, that the officers of the Buckeye knew that the Montauk was going up stream, and that she had given them the signal, to which they had responded, as to the side upon which she would come. Between the Main-street bridge and Allen's slip there is a bend in the river which somewhat obscures the view in a direct line to a person standing upon the docks; but a man standing upon the bow of a steamer like the Buckeye, which was running light, with her bow high out of water, on account of her machinery being in her

stern, could undoubtedly have seen the Montauk plainly from the time the Montauk sounded her whistle, and, even if he did not see her, it was not by reason of the darkness of the night, but by reason of the bend in the river and the lumber piled on the dock. He had notice that she was there; that she was coming up the river; for her whistle had told him all this. It was, therefore, his duty to go slowly and cautiously; and more especially was it his duty, if, knowing that the Montauk or any other steamer was coming up the river, he was unable, by reason of the crookedness of the river, to see her, to go very carefuly. The crooked river and even the approaching darkness imposed additional caution upon those in charge of the Buckeye, and they should have gone more moderately, should have slackened speed, and, if necessary, stopped; but, instead of doing so, it would seem from all the proof that the Buckeye was going down the river at a rate, as I have said, of six or more miles an hour, where the river was so crooked that it was extremely difficult to see objects more than a few hundred feet ahead, which, under the circumstances, can be called little short of recklessness. As a rule, I think, it may be said to be negligence for any craft to be moving in that part of the river faster than three miles an hour during the season of navigation, and when the stream is crowded with other craft either moving or moored to the docks; but whatever may be the rate of speed, the craft should be completely under control, so that she can be stopped, or her course changed promptly.

But the captain of the Buckeye says that when he discovered the Montauk, instead of shutting off steam and reversing, as necessary, he put on additional steam, hoping to swing his steamer, as he says she was then swinging, to starboard more rapidly, so as to avoid collision with the Montauk. Granting that he did not discover the exact locality of the Montauk until just as he was turning the bend above Allen's slip,

which I can hardly believe to be true, he could then have stopped before striking her if he had promptly reversed his engine. I cannot avoid the conclusion that the conduct of the master of the Buckeye savors strongly of recklessness in the speed with which he was going down the river, and the manœuvers which he adopted to avoid a collision after he says he discovered the Montauk. I have carefully looked over the proof, and considered whether this is a proper case to divide the damages, but can see no evidence of mutual negligence. The only ground for it is the assumption that the Montauk was on the east side of the river, which I do not think sustained by the proof. The proof in the case, when carefully considered and analyzed, satisfies me that this collision did not occur later than 7:30 o'clock in the evening. The sun set that night at 6:53, so that it was, at most, only a little more than half an hour after sunset; and this, on a summer night, would not make it so dark, even if it was quite cloudy, that an object as large as the Montauk could not be plainly seen on the water at least twice the distance from the bridge to Allen's slip. The map of that part of the river which is in proof in the case shows that it is over 700 feet from the west draw of the bridge to the point where the collision occurred, and that even if the Buckeye steered directly over to the east side or to the east half of the river immediately after passing through the draw, she would have a plain view of the whole river to a point below Allen's slip as soon as she reached a point opposite the mouth of the gas-house slip, and she would then be over 400 feet above the point of collision, and probably 500 feet away from the Montauk. Let any one interested in the solution of this question of fact, as I have been ever since I have heard this case, notice from evening to evening the amount of light remaining, even in a cloudy evening, at this season of the year, for 30 or 40 minutes after sunset, and I think he can hardly

avoid the conclusion that there must have been on the evening of August 19, 1880, ample light at 7:30 o'clock to have enabled those on the Buckeye to have seen and avoided the Montauk. The night or evening was not phenominally cloudy or dark, but merely an overcast or cloudy evening.

I come, therefore, to the conclusion that the collision in question was not contributed to or caused by the absence of lights, but that it was occasioned by the negligence of the master and those in charge of the Buckeye. The exceptions to the commissioner's report will be overruled, and a decree entered in accordance with the findings of the report.

JAMES B. DOYLE vs. UNITED STATES.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1881.

1. CRIMINAL LAW—COMMUNICATION BY JUDGE WITH JURY.—Though it is irregular and objectionable for a judge to answer privately by note, a communication from one of the jurors, while the jury are deliberating upon their verdict; yet a judgment will not be reversed upon this ground unless it appears that such action worked a prejudice to the accused.

2. PRESENCE OF JURY WHEN SEALED VERDICT IS OPENED MUST BE SHOWN BY RECORD.—Where the accused consented that when the jury had agreed upon a verdict they might sign and seal the same, and if the court was not then in session hand it to the officer in charge of the jury to deliver to the clerk, and that the jury might then disperse to meet the court when it should again convene, it was the right of the prisoner to have the jury present in court when the verdict was opened, and if the record does not show that they were so present, the judgment will be reversed for this reason.

3. RIGHT OF GOVERNMENT TO NEW TRIAL—ONCE IN JEOPARDY.—But in such case the Government will be entitled to a new trial, and the defendant will not be discharged on the ground that he has been put once in jeopardy.

4. POLLING JURY AFTER SEALED VERDICT.—*It seems*, that in the Federal Court in this district the defendant is not entitled, as of right, to poll the jury when he has agreed to a sealed verdict.

Error to the District Court.

Bangs & Kirkland, for the plaintiff in error, cited in support of the proposition that the court erred in privately communicating with one of the jurors while they were deliberating upon their verdict: Wharton's Criminal Practice, 8th ed., sections 714 and 830; *State vs. Alexander*, 66 Mo. 148; *Sargent vs. Roberts*, 1 Pick., 341; 2 Graham & Waterman on New Trials, 360; *State vs. Patterson*, 45 Vt. 308; *Taylor vs. The State*, 42 Texas, 504. The court erred in receiving as a verdict the paper writing offered and read by the clerk, and in accepting the same as a verdict: *Stewart vs. People*, 23 Michigan, 63; *Nomaque vs. People*, Breese, 145; *Lawrence vs. Stearns*, 11 Pick, 50; *Commonwealth vs. Tobin*, 125 Massachusetts, 206; *Tyrrell vs. Lockland*, 3 Blackford, 136; *Young vs. Seymour*, 4 Nebraska, 86; *United States vs. Potter*, 6 McLean, 188; *United States vs. Bennett*, 16 Blatchford, 373; *Commonwealth vs. Carrington*, 116 Massachusetts, 37; *Johnson vs. Depuy*, 1 Penning, 165; *State vs. Mills*, 19 Arkansas, 476; *Root vs. Sherwood*, 6 Johns., 68; *Riggs vs. Cook*, 4 Gilm., 352; *Sargeant vs. State*, 11 Ohio, 473; *Martin vs. Morelock*, 32 Illinois, 485; *Rems vs. People*, 30 Illinois, 256; *Crotty vs. Wyatt*, 3 Bradwell, 388; *Chicago vs. Rogers*, 61 Illinois, 188; *Jarrell vs. State*, 58 Indiana, 293; *Mains vs. Cosnor*, 62 Illinois, 465; *Chicago vs. Langdass*, 66 Illinois, 361; *Price vs. State*, 38 Mississippi, 531; *Stubbs vs. State*, 49 Mississippi, 722; *Goodwin vs. Appleton*, 22 Maine, 456; *Woner vs. N.*

Y. C. R. R. Co., 52 New York, 437; *Mead vs. Smith*, 16 Connecticut, 345; *State vs. Young*, 77 North Carolina, 498; *Temple vs. Commonwealth*, 14 Bush (Ky.,) 769; *Price vs. Hasbrouck*, 49 Illinois, 23; *Williams vs. People*, 44 Illinois, 478; *Miller vs. Mabon*, 6 Iowa, 457.

That the court erred in denying the defendant's motion to have the jury polled: *Hill vs. People*, 16 Michigan, 351; *State vs. Bogain*, 12 Louisiana Ann., 264; *Rister vs. State*, 26 Alabama, 106; *Malone vs. State*, 49 Georgia, 211; *State vs. Hughes*, 2 Alabama, 102; *Maduska vs. Thomas*, 6 Kansas, 159; *Adkins vs. Blake*, 2 J. J. Marsh, 40; and other cases cited *supra*.

The court erred in refusing to discharge the prisoner on the ground of having been once put in jeopardy: *United States vs. Farring*, 4 Cranch, C. C., 465; *United States vs. Negro Randall*, 2 Cranch, C. C., 112; *People vs. Webb*, 38 California, 477; *People vs. Gage*, 48 do. 323; *United States vs. Shoemaker*, 2 McLean, 114; *United States vs. Watson*, 3 Benedict, 1; *Lyman vs. State*, 47 Alabama, 686; *Bell & Murray vs. State*, 48 Alabama, 696; *Bell vs. State*, 44 Alabama, 393; *Atkins vs. State*, 16 Arkansas, 568; *Lee vs. State*, 26 Arkansas, 260; *People vs. Hunckeler*, 48 California, 334; *McCorkle vs. State*, 14 Indiana, 39; *State vs. Walker*, 26 Indiana, 346; *State vs. Wilson*, 50 Indiana, 487; *State vs. Callendine*, 8 Iowa, 290; *Hines vs. State*, 24 Ohio, 134; *Brennan vs. People*, 13 Illinois, 511; *Keedy vs. People*, 84 do. 569; *Hunt vs State*, 25 Mississippi, 378; *Shepherd vs. People*, 24 New York, 406; *State vs. Martin*, 30 Wisconsin, 223; *People vs. Gilmore*, 4 California, 376; *Campbell vs. State*, 9 Georgia, 333; *Jones vs. State*, 10 Texas, 168; *State vs. Ross*, 29 Missouri, 32; *State vs. Kettleman*, 35 Missouri, 106; *Teat vs. State*, 53 Mississippi, 439; *Finch vs. State*, id. 363; *Nolan vs. State*, 55 Georgia, 521; and other cases.

Joseph B. Leake, U. S. District Attorney, for defendant in error, cited: That the defendant had no right to poll the jury: *Commonwealth vs. Roby*, 12 Pick., 496; *Martin vs. Maverick*, 1 McCord, 24; *State vs. Allen*, id. 525; *Beal vs. Hall*, 22 Georgia, 431; *Dunlap vs. Monroe*, 1 Cranch, 536; *United States vs. Anthony*, 11 Blatchf., 209; *United States vs. Bridges*, 10 Central Law Journal, 7.

DRUMMOND, J.—At the last May term of the District Court the plaintiff in error was tried on an indictment for passing false and forged bonds of the United States, knowing them to be forged. He was found guilty by the jury, and a motion for a new trial was made and overruled, and sentence of imprisonment passed upon him by the court. The case was given to the jury under instructions of the court on the afternoon of the 3d of June. On the morning of the 4th, before they had agreed upon a verdict, and while the jury were together in their room, having it under consideration, the judge who tried the case received by the hand of the bailiff in charge of the jury the following communication from one of the jurors:

"Has there been any evidence of Doyle's knowledge that these bonds were forged, and can a person be convicted without positive evidence as to his guilt?" To which communication the judge caused to be delivered by the hand of the bailiff to the juror his answer written upon the back of the communication as follows: "The jury are to determine from all the evidence in the case whether the defendant knew these bonds to be forged. If the circumstances are such as to satisfy you beyond a natural and reasonable doubt of defendant's guilt, then you should so find, otherwise you should acquit. Please preserve this."

There is nothing in the record to show whether the juror wrote this communication and addressed it to the judge of

his own motion, or at the instance of other members of the jury. Neither does it affirmatively appear that the answer of the judge was made known to any of the other jurors. The communication and the answer were made and received as stated above not in open court, the court in fact not being in session on the fourth of June, nor in the presence nor with the knowledge or consent of the plaintiff in error or his attorneys.

The answer of the judge to the communication of the juror under the circumstances stated is assigned for error on the record.

After the case was submitted to the jury by the court, the plaintiff in error and his attorneys consented that when the jury had agreed upon a verdict they might sign and seal the same, and if the court was not then in session they might hand it to the officer in charge of the jury to deliver it to the clerk, and that the jury might then disperse to meet the court when it should again convene; and thereupon the court on Friday, June 3, adjourned, and did not again meet until Monday morning, June 6. On the opening of court then, the jury not being present in their seats nor having been called in the cause, the court addressed the clerk, and asked if he had the verdict, whereupon the clerk replied that he had such verdict, and produced a sealed envelope from which he took a paper writing which he then read in open court as follows: "We, the jury, find the defendant, James B. Doyle, guilty, and recommend him to the mercy of the court," which verdict was signed by all the jurors, and was duly recorded. At the time this paper was read in court no objection was made by the plaintiff in error or his counsel to the opening of the sealed envelope, nor to the reading of the verdict, but the counsel moved the court to have the jury polled which motion the court overruled and refused to allow the jury to be polled. This action of the court in thus receiving the

paper writing as the verdict of the jury, and refusing to allow the jury to be polled, is also assigned for error.

It is unnecessary to consider the various other errors assigned, as not much reliance was placed upon them by the counsel, and as, I think, they are untenable.

There can be no doubt that the communication of the judge to the juror was irregular and objectionable. The instructions of the judge ought always to be in open court, in the presence of all the jurors and of the defendant. It is true that in cases of protracted deliberation by the jury and of renewed instructions, it is sometimes difficult and inconvenient to observe this rule; and yet it is important that it should be followed, not that where it may be violated that fact would necessarily oblige an Appellate Court to reverse the conviction, but because there is always so much danger in giving these private instructions not open to the observation of counsel or of the parties. If there is nothing in instructions thus privately given prejudicial to the defendant, then an Appellate Court would not, perhaps, reverse. It is probable that the judge in this case may have inferred that the communication addressed to him was sent by the foreman, or at the instance of all the jury; and there was nothing objectionable in the law as laid down by the judge,—and, indeed, the judge had already given substantially the same instructions to the jury in open court. It was, no doubt, inadvertently done and nothing wrong was intended on his part, as is manifest from the memorandum he added to his answer, requesting that it might be preserved, for the purpose of being subject to examination and criticism if the law warranted it. I doubt whether I should reverse this case merely in consequence of this irregularity of the judge, because I think it is not clear that it necessarily worked any prejudice to the plaintiff in error.

On the second point numerous authorities have been

cited by the counsel for the plaintiff in error to show that the right exists on the part of the defendant in a criminal case always to poll the jury, whether the verdict be rendered in open court or by being sealed under the direction of the court or by the consent of the parties. There can be no doubt that in most of the states, including Illinois, it is decided that it is the absolute right of the defendant in a criminal case, both upon an open verdict rendered in court and a sealed verdict to poll the jury. But it seems to be a right which has generally grown up as a matter of practice. It was not a right which existed at common law. The *court* always had the right to poll the jury and if a different verdict was rendered from that delivered privily to the judge, or which was first rendered in court, the court had authority to punish those jurors who dissented from the verdict. In some of the states the right of the defendant in a criminal case to poll the jury is denied. In the Federal Court in this district, the practice has been not to allow a defendant, as of right, to poll the jury when he has agreed that a verdict may be signed and sealed by the jurors and delivered in court. If this were a question merely of polling the jury, under this practice I should not feel inclined to disturb the sentence of the court. For example, if the jury had been allowed to separate upon the understanding and agreement that they were not again to meet the court, in such case it would seem that the right to poll the jury had necessarily been waived. But in this case they were required to meet the court when it again convened, and the necessary construction to be given to this is that the jury should be present in court when the verdict was opened. They had formed their verdict and sealed it at the place of their deliberations. They had handed it to the officer to be delivered to the clerk. It was the right of the defendant under the circumstances to have the jury present in court when the verdict was opened, in order

that they might know that the verdict which they had agreed upon and signed was delivered in court to be entered of record. In states where the jury is not permitted to be polled, the practice has always been to require the jury to be present upon the delivery of a sealed verdict. In the case of *United States vs. Bridges*, 10 Central Law Journal, 7, decided in the Federal Court in the district of Alabama, where the court refused to allow the jury to be polled, the case shows that the jury were all present when the verdict was opened and read in court. In all cases it is true that what gives effect to the verdict of the jury is, that it is delivered or opened and read in court, and there recorded. It thereby becomes the act of the court. The record in this case does not show that the jury were present when the verdict was opened in court; and, it does not clearly appear that the plaintiff in error waived his right to have the jury present when the sealed verdict was opened; and for that reason the sentence and judgment of the District Court will be reversed.

The counsel for the plaintiff in error has also made a motion to discharge him from the accusation against him in the indictment, because he has once been tried before a jury, and no valid verdict has been rendered; and it is insisted that to to try him again will be to put him twice in jeopardy, contrary to the provisions of the Constitution. That motion I shall overrule. He consented to receive a sealed verdict; that verdict was received, not under circumstances to make it such a verdict as to warrant an Appellate Court in sustaining a conviction upon it, but it cannot be regarded as placing the plaintiff in error twice in jeopardy because he has to be tried again. There was not the regularity which he had the right to insist upon in this verdict, but the Government has the right to claim that he shall be tried again; and the only effect of the reversal of the sentence and judgment of the District Court, will be that a new jury must try the case,

and, as counsel agree that trial may be had in this court, it will be so ordered. Section 3, Act March 3, 1879, 20 Stat. at Large, 354

CAROLINE M. FORSYTHE *et al.* vs. SYLVAAS P. VAN WINKLE *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—DECEMBER, 1881.

EJECTMENT—RIGHT TO NEW TRIAL.—Where an action of ejectment was commenced against several defendants, but issue was had only on a separate complaint against one of them, and judgment was rendered against that one defendant for the land, and against all defendants for costs, only that defendant against whom the judgment for the land was rendered, his heirs, assigns and representatives are concluded by the judgment, or entitled to a new trial under the statute.

McDonald & Butler, for plaintiffs.

C. P. Jacobs, for defendants.

GRESHAM, J.—The plaintiffs, Caroline M. Forsythe and Jacob Forsythe, her husband, commenced their action of ejectment in this court on the 25th of July, 1874, against Sylvaas P. Van Winkle, Richard Robinson, Charles Rose, James Lanagan and John A. Smale, to recover possession of a large amount of real estate in Lake county, Indiana. Process was duly served on all the defendants.

On the 17th of December, and before appearance to the action, the plaintiffs filed, against the defendant Smale, only,

a separate complaint, embracing a part of the lands described in the original complaint, and at the same time filed a sepa rate complaint against the defendant Rose, embracing another part of the lands described in the original complaint. After the separate complaints were filed,—on the 20th of January, 1875,—no answers having yet been filed to any of the complaints, the court ordered "that the said complaint against Smale stand as the complaint in this action, and that the complaint against Rose be docketed as a distinct and separate action," which was done.

To this complaint Smale filed a demurrer, which was overruled. On the 30th of June, 1876, it appears from the record that the "defendants" were ruled to answer. On the 14th of November, Smale answered the amended and separate complaint against him, and the general denial was filed for the defendants. The case was then put at issue on the special answer of Smale by a reply in general denial. The cause was heard before the court on stipulation from counsel, and the record shows that on the 6th of June, 1879, judgment was rendered for the plaintiffs against John A. Smale for the recovery of the land described in the amended complaint, and against all the defendants for costs. On the 17th of March, 1880, on motion filed the day previous, an order was entered vacating the judgment, and granting a new trial under the statute as of right, the costs having been paid, and the death of defendant Smale was suggested. On the 17th of May, 1881, the plaintiffs entered a special appearance by counsel who had not heretofore appeared in the case, and moved the court to set aside the order vacating the judgment and granting the new trial, among other reasons, because,

(1) The motion for a new trial was not made by John A. Smale, nor by his heirs, assigns or representatives, he being the only defendant against whom a judgment of ejectment was

rendered, and that Smale had died between June 6th, 1879, and March 16th, 1880, to-wit, in September, 1879; (2) that the motion for a new trial does not disclose that any judgment in ejectment had been rendered.

It is urged, in opposition to the motion, by counsel now for the first time appearing for the defendants, that Smale's co-defendants occupy such a relation to the issue which was tried by the court as to be affected by the judgment, and that therefore, they are within the letter and spirit of the statute, which allows the unsuccessful party a new trial as a matter of right; that the application for a new trial was made for the benefit of Smale's heirs as well as his co-defendants; that the statute is remedial and should be liberally construed; and that the motion to vacate comes too late.

Section 601 of the Indiana Code provides, that the court rendering the judgment, at any time within one year thereafter, upon the application of the party against whom the judgment is rendered, his heirs or assigns or representatives, and upon the payment of all costs, and of the damages if the court so direct, shall vacate the judgment and grant a new trial.[1]

Section 602 provides, that if the application for a new trial is made after the close of the term at which the judgment is rendered, the party obtaining the new trial shall give the opposite party ten days' notice thereof before the term at which the action stands for trial.

After all the defendants have been served with process, and before any of them had appeared to the action, the plaintiffs filed an amended or separate complaint, embracing only part of the lands described in the original complaint, against the defendant, John A. Smale, alone. Shortly after this was done the court ordered that the amended complaint should there-

[1] Revised Statutes of Indiana, 1881, section 1064.

after stand as the complaint in the case. The controversy was thus limited to one between the plaintiffs and the defendant Smale, so far as the lands described in the amended complaint were concerned. No issue was tendered by the amended complaint to any one but Smale, and no right of his co-defendants in the original complaint to the land described in the amended complaint and in the judgment in ejectment were affected by that judgment. It is true that the suit continued to be entitled as it was originally docketed, and the word "defendants" appears at times in the pleadings and record, instead of the word "defendant," but this was, perhaps, a misuse of the plural; and the whole record sufficiently shows that the controversy which was submitted to the court was between the plaintiffs and Smale only.

After dismissing as to Smale's co-defendants, as the plaintiffs in effect did by their amended complaint,—to the extent, at least, of the lands described in that complaint,—and taking judgment against Smale alone for those lands, the plaintiffs could claim nothing under that judgment against any one but Smale. No one being concluded by the judgment but Smale, it follows that no one was entitled to a new trial but Smale, his heirs, assigns, or representatives. The judgment in ejectment, as already stated, was limited to Smale only. It is only at the conclusion of the judgment that the plaintiffs are shown to have recovered costs of the "defendants." Neither at the time of vacating the judgment of ejectment, nor at any subsequent time until to-day, has it been made to appear that Smale died leaving heirs, assigns or representatives.

The new trial was taken at a subsequent term, and it does not appear from the record, or any evidence before the court, that the plaintiffs have lost their right to have the erroneous order granting a new trial vacated.

THE HYDERABAD.

District Court—Eastern District of Wisconsin—January, 1882.

In Admiralty.

1. Salvage—The relief of a vessel from an impending peril of the sea by the voluntary exertions of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the vessel, constitute a case of salvage.

2. Circumstances Constituting Case of Salvage—Derelict.—Where a vessel has been injured by a collision and thereby rendered so unsafe that the master and crew went aboard the colliding vessel, leaving the injured one to drift, but without intending to abandon such vessel, and with the intention of proceeding to the nearest port to procure a tug with which to pursue and rescue such injured vessel; and about thirty hours thereafter a steam barge sights the deserted vessel drifting helplessly at sea in great peril, and goes to her assistance and takes her in tow, before her master comes to her assistance with a tug, which he subsequently does; in such case, although it is doubtful whether the deserted vessel was strictly and technically derelict, yet this would constitute a case of salvage.

3. Right of Salvors to Retain Possession of Vessel.—The finders of the wrecked vessel having originally taken lawful possession of her, had the right as salvors to retain possession until their just demands should be paid, or until the vessel should be taken into the custody of the law preparatory to the amount of salvage being legally ascertained.

4. Amount of Salvage.—In determining the amount of salvage to be awarded under the circumstances of this case, the court takes into consideration the fact that the master and crew of the wrecked vessel were in pursuit of her with a tug, and accompanied her into port with her salvors, as a fact bearing upon the probability of her ultimate rescue by them.

5. The court allows $1,750 salvage.

Finches, Lynde & Miller, for libellants.

Markham & Noyes, for claimants.

The Hyderabad.

DYER, J.—This is a cause of salvage. Two libels have been filed, one by the owner of the steam barge Alpena, and the other by her master and crew, in which last mentioned libel the master of the barge Wenona joins. The material facts are as follows:

On Monday, the 7th day of June, 1880, the Alpena, of which the libellant, Bewick, was owner, and of which the libellant, McGregor, was master, having in tow the barge Wenona, of which the libellant, Tucker, was master, was on a voyage from Buffalo to Milwaukee; and at about 7 o'clock in the evening of that day, at a point in Lake Michigan southwest of South Manitou Island, and about ten or eleven miles off Point Au Becs Scie, the schooner Hyderabad was discovered in a disabled condition, with no one on board of her. The Alpena and her tow had arrived at North Manitou on the 6th, and on account of adverse weather had remained there under shelter until the afternoon of the 7th, when they resumed their voyage, sailing on a southwesterly course for Milwaukee. Both the Alpena and her tow were light. The testimony tends to show that the values of the Alpena and Wenona, respectively, were $40,000 and $18,000.

The Hyderabad had been in collision with the schooner Ford River. The former vessel had left Milwaukee on Friday evening, June 4th, laden with a cargo of about 19,800 bushels of wheat, bound for the port of Kingston. The Ford River was going to Chicago, loaded with posts, ties and telegraph poles, and the collision occurred at about half-past four o'clock on the morning of Sunday, June 6th.

Concerning the injuries sustained by the Hyderabad in the collision, one of the seamen on that vessel, sworn in behalf of the claimants, testifies: "The bowsprit, jibboom, foretop-mast, main gallant mizzen gaff, boat's davits, mainsail, and the mizzen were all injured or carried away by the collision. There was a hole in the port quarter just forward

of the mizzen rigging; it was about eighteen inches to two feet in length, and about the breadth of one of her planks; the plank was broken and bulged in. This break was about three to four feet above the deep load line. The water went from this hole into the kitchen and from there it leaked down through the kitchen floor into the hold." The same witness says that the Ford River struck the Hyderabad on the port side of the stem, forward; that the hole in the Hyderabad's port quarter was made by the posts projecting over the rail of the Ford River, and that "when her bow swung off, that brought her stern in. Her headstays and our headstays got entangled. The motion of the vessels in the water, one rising and the other falling, caused the ends of the cedar posts projecting over the rail of the Ford River to strike the Hyderabad on her port quarter, and thus made the hole." He says also that the Hyderabad's small boat was broken, and that this was caused by the two vessels getting entangled and knocking the port davits away and pounding each other aft.

Another of the claimant's witnesses, speaking of the injuries to the Hyderabad, says: "Our bowsprit was carried away from outside the knighthead, our foretop-mast was carried away from the cap of the foremast head, and of the maintop mast the gallant pole was carried away. Her foresail was torn, her mizzen was torn, her mainsail was torn a little. Her rail was lifted up off the stanchions a little, forward on the port side. Aft, just forward of the mizzen rigging, on the port side, there was a plank bulged in; the wood all remained there. * * The false covering board was started from the plank about a foot in length and about an inch in the highest place, and then run off to nothing at either end. The oakum was not all out."

The master of the Hyderabad testifies that in the collision his vessel lost her bowsprit, jibboom, head gear, foretop-mast, maintop gallant pole and two jibs; that the mizzen-boom

was broken, and that the rail was started a little forward, and one stanchion was cracked; that on her port quarter the false covering board was started, and the plank between the covering board and the false covering board was stove in.

At the time of the collision there was a heavy sea running, and the master and crew of the Hyderabad, being fearful that their vessel would sink, went immediately on board the Ford River. That the Hyderabad was then supposed to be, and was in fact, in sufficient jeopardy to cause great alarm, there can be no doubt. For a considerable time the Ford River remained near her, and before leaving her, the master and mate of the Hyderabad and two of the crew of the Ford River attempted to board the Hyderabad, but the sea was so heavy that the small boat could not lie alongside the latter vessel with safety, and the attempt was abandoned. Wilson, one of the crew of the Ford River, testifies that at that time a tug could not have gone alongside the Hyderabad, and that sometimes as she rolled, her rail was under water. The testimony however. tends to show that her hatches were then secured and in good condition.

As all further effort to relieve the Hyderabad, in existing circumstances, was impracticable, the Ford River set sail for the west shore of the lake, taking with her the Hyderabad's entire crew. The Hyderabad was then standing head to the wind and sea, with her main sail and stay sail set, and various witnesses for the claimants testify that she appeared to be riding the seas easily, and without the appearance of being water-logged.

The Ford River left the Hyderabad about two o'clock in the afternoon of Sunday, June 6th, and arrived off Manitowoc about half-past seven o'clock on the following morning. It is very clearly shown that the purpose of the masters of both the Hyderabad, and the Ford River, in sailing

directly for the west shore of the lake, was to reach a port where a tug could be obtained to go to the relief of the Hyderabad, and that this was the intention of the master and crew of that vessel when they left her. It is, of course, apparent, that they went on board the Ford River, in the first instance, for greater personal safety, and that they did not, up to the time when the Ford River left, regard it safe to attempt to remain on the Hyderabad; nor could they be otherwise than doubtful whether she would survive her extremity; but it is clear that when the Ford River left the scene of the disaster, the master of the Hyderabad had not abandoned the hope of reclaiming his vessel; and that his intention was to make every exertion in his power to save her. This is manifest from what follows; for, on arrival at Manitowoc, the masters of the two vessels went directly to the telegraph office, and endeavored to engage a tug from Two Rivers for immediate service, and on failing to accomplish this, a tug from Milwaukee was sent for, which at once responded to the call for assistance, and arrived at Manitowoc in the evening of that day. The tug remained at Manitowoc that night, and at about three o'clock in the morning of the eighth, started with the crew of the Hyderabad, on a northeast course in pursuit of that vessel.

As before stated, the Alpena, while on her course to Milwaukee, sighted the Hyderabad on the evening of Monday, the 7th, and nearly thirty hours had then elapsed from the time the Ford River had left the Hyderabad. The master of the Alpena testifies that when he found the wrecked vessel, her head-gear, bowsprit and jibboom were carried away, and were hanging alongside of her; that her portside was in a broken up condition, particularly above the plank sheer; "her forestay sail was set; fore sail seemed to be hanging about decks, torn up and in a very rough condition; mainsail was partly set, torn badly; mizzen sail in bad condition;

boom carried away; small boats were gone. We afterwards found a hole in the port side. Her main topmast was carried away and was hanging down in the rigging; did not see anyone aboard of her when I reached her; she had evidently been abandoned, and her decks I could see from the pilot house under water, amid-ship. * * * There was some sea running; she was rolling helplessly in the sea." This is the language of the witness.

The mate of the Alpena, testifying as to the condition of the Hyderabad, says: "Her wheel was unshipped; all her head-gear carrried away; her mainsail was all torn; her foresail was lying unfurled on deck; her jibboom and bowsprit was hanging over her bow; her mizzen boom or gaff was broken; her main topmast was gone—hanging down; there was a break in her port quarter right under her covering board; I should judge the hole was in the neighborhood of two feet or eighteen inches long; * * * I think the hole was about the width of one plank; this hole was, I should judge, three feet, if she lay still, from the water."

There is other testimony on the part of the libellants as to the condition of the Hyderabad, similar to that just referred to, and further showing that one of the vessel's pumps was out of working order.

The master of the Alpena ordered part of his crew to go aboard the Hyderabad and to take measures to rescue her. The master of the barge Wenona and some of her crew also went on aboard. Certain precautions were taken for the escape of those who went on the Hyderabad in case their safety should be threatened by sudden danger. In the then state of the weather, there was, in fact, no special peril in the undertaking, but in ignorance of the precise condition of the Hyderabad, it was naturally feared she might suddenly sink. After ascertaining the extent of her injuries, and the condition of her cargo, the crew of the Alpena,

aided by some of the crew of the Wenona, put her pumps in working order, covered the break on her port quarter with canvass, adjusted her steering gear as best they could, and then got out a line and took her in tow, astern of the Wenona. It was quite a late hour in the evening when this was accomplished, and the vessels then proceeded on a course to Milwaukee, moving slowly and cautiously, as there was yet some fear that the Hyderabad might be swamped or capsized.

While thus under way, between eight and nine o'clock on the morning of the 8th, the vessels were met by the tug which had left Manitowoc that morning, with the master, mate and crew of the Hyderabad on board. The tug came alongside the Hyderabad, and the mate and crew went aboard of her. The testimony tends to show that the master of the Hyderabad then informed the master of the Alpena, that he was the chief officer of the former vessel and had come with a tug to repossess her and take her in tow. The master of the Alpena declined to surrender possession and asserted his claims as a salvor. Some further negotiations were attempted in the course of which the master of the Hyderabad claims that he gave the master of the Alpena assurance that he should be adequately compensated for his services, but they were unavailing, and thereupon the tug returned to the Hyderabad, took from her a line and thus all the vessels proceeded to Milwaukee, where they arrived at ten o'clock in the evening of that day. From the time the master and the crew of the Hyderabad returned to her, until their arrival in port, such joint control was exercised over the vessel by them and by the master and crew of the Alpena, as manifested a purpose to assert on one hand the rights of salvors, and on the other, the right of original authority and possession, temporarily lost, but now reclaimed; and the same state of affairs continued, without reference to possession, after the vessel was brought into port and until the removal of

her cargo, which was completed on the afternoon of Thursday, June 10. I do not find that the Alpena in going to the relief of the Hyderabad was obliged to materially deviate from her original course, and the testimony tends to show that she lost from eleven to twelve hours time in rendering the service in question. There is serious dispute between the parties, as to the peril the Hyderabad was in on account of water in her hold, and as to the extent of injuries to her cargo.

The testimony does not show the precise proportions in bushels of dry and wet wheat, but the witness Vance testifies, that after the dry grain was taken out, there remained in the vessel about ten thousand bushels of damaged wheat as near as he could judge. The dry part of the cargo was sold for $9,016.87; the wet wheat was sold for $500, and the vessel in her damaged condition was appraised at $8,050, so that the entire value of vessel and cargo, after arrival in port, may be said to have been $17,566.87.

It is contended in behalf of libellants, that the Hyderabad when found by the Alpena was in the full sense of the law, derelict. Sir Leoline Jenkins defined derelicts to be, "boats or other vessels forsaken or found on the seas without any person in them:" Life of Sir Leoline Jenkins: vol. 1, page 83.

The case of the Hyderabad answered this description. Sir William Scott, in the case of the *Aquila* 1 C. Rob. 41, said, "It is sufficient if there has been an abandonment at sea by the master and crew, without hope of recovery; I say without hope of recovery, because a mere quitting of the ship for the purpose of procuring assistance from shore, or with an intention of returning to her again, is not an abandonment." In *Rowe et al. vs. Brig*——, 1 Mason, 373, Judge Story said, that to constitute a derelict in the sense of the maritime law, "it is sufficient that the thing is found deserted or abandoned upon the seas, whether it arose from accident or necessity or voluntary dereliction. Sir William Scott has declared that a

legal derelict is properly, where there has been an abandonment at sea by the master and crew without hope of recovery. With the view for which the words 'without hope of recovery,' are introduced, viz.: to distinguish a temporary absence from a permanent abandonment, it might perhaps have been more accurate to have said, an abandonment without an intention of return; since the *spes recuperandi* might exist, even though the abandonment were without such intention."

In the *Coromandel*, 1 Swabey, 208, Dr. Lushington said: "A master and crew abandon a vessel for the safety of their lives; he does not contemplate returning to use his own exertions; but the master hardly ever abandons a vessel on the coast, without the intention, if he can obtain assistance, to save his vessel. That does not take away from the legal character of derelict."

In the case of *The Bee*, 1 Ware's Rep. 344, Judge WARE says: "When a vessel is found at sea, deserted, and has been abandoned by the master and crew without the intention of returning and resuming possession, she is, in the sense of the law, derelict."

In the case of *The Island City*, 1 Black, 128, it was held by the Supreme Court, that "to constitute a case of derelict, the abandonment must have been final, without hope of recovery, or intention to return. If the crew have left the ship temporarily with intention to return after obtaining assistance, it is no abandonment, nor will the libellant be entitled to the salvage, as of a derelict."

Thus it appears, that within the definition laid down by some jurists, the libellants are right in their contention as to the legal character of the Hyderabad when she was found by the Alpena; but within the rule stated in the case of *The Island City*, it is doubtful whether she was strictly and technically derelict. But, although the master of the Hyderabad

may be said not to have abandoned the *spes recuperandi*, nor to have renounced the *animus revertendi*, she was at least *quasi* derelict. In the language of Judge BETTS, in the case of *The Gilpin*, Olcott, 80, "she was apparently abandoned, and if her crew might have been absent to procure assistance from other vessels and more force, their ability to return to the wreck, or the chance of affording any aid after the lapse of a few hours, must, in the then condition of things, have been most dubious contingencies."

That the Hyderabad was in grave peril after the collision is apparent. She was out of sight of land, and was at the mercy of the elements. She had been deserted nearly thirty hours when the Alpena came upon her. When an abandoned vessel is thus found floating at large on the high seas, there is, of course, the consideration that, so far as any beneficial property of the owner is concerned, it is in the utmost peril,—nearly as much so when it happens to turn out tolerably seaworthy as if it were in bad order, because, in any event, the chance of recovery must be slight: *The Howard*, 1 Lowell, 7.

The libellants would have been guilty of a dereliction of duty, finding the Hyderabad as they did, helplessly afloat on the lake, if they had not taken immediate measures for her relief. When property is found thus temporarily left to the mercy of the elements, whether from necessity or any other cause, though not finally abandoned and legally derelict, and the finder takes possession of it with the *bona fide* intention of saving it for the owner, he will not be treated as a trespasser. On the contrary, if, by his exertions, he contributes materially to the preservation of the property, he will entitle himself to a remuneration according to the merits of his services as a salvor: *The Bee, supra.* The relief of property from an impending peril of the sea, by the voluntary exertions of those who are under no legal obligation to render

assistance, and the consequent ultimate safety of the property, constitute a case of salvage. It may be a case of more or less merit, according to the degree of peril in which the property was, and the danger and difficulty of relieving it. But these circumstances affect the degree of the service, not its nature: *Williamson vs. The Brig Alphonso and Cargo*, 1 Curtis, 378.

The service rendered by the libellants, or some of them, was then a salvage service, and the remaining question is, what compensation should be awarded? As was said by the court in the case of *The Gilpin*, *supra*, I do not think this a case of extravagant compensation. Although the services were well timed, faithful and highly meritorious, and outrank a mere *quantum meruit* reward, yet they are not entitled to be placed in the highest order of perilous salvage services. The risk incurred by the libellants, and the danger to which the property employed by them in rescuing the Hyderabad was exposed, were not extraordinary. The skill shown in rendering the service and the labor performed were adequate, but not of singular character. The time occupied, the value of the property saved, and the value of the libellant's vessels, have been stated. The more difficult question is, what was the degree of danger to which the Hyderabad was exposed when she was found and taken in tow by the Alpena? That she was in serious peril immediately after the collision, and that any vessel, left as she was to drift at large, subject only to the uncertain elements, is in great danger, is apparent. I am satisfied from the testimony, and from personal examination of the vessel made after the arguments, that the water found in her hold, obtained ingress through the break in her port quarter. At the time of the collision and for some time after, a heavy sea was running, and the break was not so far above the deep load line, as to be beyond the reach of the waves as the vessel rolled. The testimony on the part of the

claimants tends to show that within a few hours after the Ford River left the Hyderabad, the wind changed and became light and the seas run down; and the testimony of the libellants is to the effect that when they sighted the Hyderabad the sea had taken the form of a heavy dead swell, which was gradually subsiding. The proofs on both sides show that after the Alpena had got well under way with her tow, the weather became settled and very fine, and so continued until arrival in port. As to the depth of water in the hold of the Hyderabad, there is sharp conflict in the evidence; but I regard the testimony of the witnesses, sworn on the part of the libellants, as most reliable on the question. They testify that her pumps were kept in constant operation throughout the night when she was taken in tow, and until eight o'clock on the following morning. The mate of the Hyderabad testifies, that when he and the vessel's crew went aboard of her from the tug, there were two feet of water in her hold. That was after a night of continuous pumping, and the concurrent testimony of witnesses on both sides is, that the pumps were worked more or less from that time until the vessel reached Milwaukee. How deep she lay in the water when discovered by the Alpena, is not conclusively shown.

Her scuppers appear to have been in order after the collision so as to permit the escape of water from her decks and yet one of the libellant's witnesses testifies that there was water on her decks when they boarded her. One fact is evident: that she was not so deep in the water as to make it impracticable to take her in tow, nor does there appear to have been much difficulty experienced—her pumps being kept in operation—in towing her into port; and yet it is not to be forgotten, that when her cargo was taken out, more than one-half of it was found to be in a damaged condition, and of course, helpless exposure of the vessel to the sea, and of the cargo to the action of the water in her hold, would rapidly increase the injury to

the cargo. The witness Vance who examined the cargo after the vessel was brought into port, testifies: "After the dry wheat was taken out, the wet wheat was found all through the hold, and if I remember rightly, the most of the wet wheat was aft and amidships, and I found it in some places wet five or six feet from the bottom of the vessel, and in other places not so much. I judged that most of the water that came into the vessel, came in through the hole on her port quarter where a plank was broken near the water's edge."

It was contended in argument by claimants' counsel, that when the tug, with the master of the Hyderabad, met the Alpena, the master of the Alpena should have yielded possession of the Hyderabad, and that his refusal so to do, should work a forfeiture of all salvage claim, or at least greatly reduce it. The finders of the wrecked vessel, having originally taken lawful possession of her, had the right as salvors to retain possession until their just demands should be paid, or until the vessel should be taken into the custody of the law, preparatory to the amount of salvage being legally ascertained: *The Gilpin, supra.* At the same time it is not permissible, under such circumstances, for the salvors to unreasonably exclude the master and crew of the wrecked vessel from all relation to and interest in the property; and in determining the amount of salvage to be here awarded, the court should take into consideration the fact that the master and crew of the Hyderabad were in pursuit of her with a tug, and that they encountered her in tow of the Alpena within eight or ten hours after she had been found, and accompanied her to port, as a fact bearing upon the probability that she would have been ultimately rescued by her own crew, without the intervention of the Alpena.

The libellants ask the allowance of at least a moiety of the value of the saved property. The claimants have tendered $1,500, but insist that the court should not award an amount

exceeding $500. Considering all the circumstances, I shall allow as salvage the sum of $1,750. As questions are raised touching the alleged wrongful appropriation by some of the crew of the Alpena of articles of personal property belonging to the crew of the Hyderabad, and consequently of their right to share in the award now made, distribution will not be ordered until further hearing on the question of apportionment.

Decree accordingly.

In order to constitute a case of salvage it is sufficient that the property be exposed to a chance which might destroy it, and that the salvors at some personal risk or loss substantially contribute to its safety; and the fact that the owner is in pursuit, unknown to the salvors, does not deprive them of their claim. *Seven Coal Barges*, 2 Bissell, 297.

It is the duty of seamen to remain by the wreck of a vessel so long as their personal safety will permit, and when they have done so, the fragments of the vessel and the outfit saved, constitute a fund pledged for payment of their wages, superior to the claim of the salvors. *The Davidson*, 9 Bissell, 275. [*Reporter*.

JOHN W. BOOKWALTER *et al.* vs. JOHN C. CLARK *et al.*

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—JANUARY, 1882.

CONTRACTS—REFUSAL TO ACCEPT ARTICLES MADE TO ORDER—MEASURE OF DAMAGES.—Where a person orders an article to be manufactured according to certain measure, pattern or style, as in case of a water-wheel of a certain size and kind, for a stipulated price, upon refusal of the purchaser to accept the article ordered, the manufacturer is entitled to recover the full amount of the contract price, and is not limited to a recovery, as damages, of the difference between the contract price and the market price of the article sold.

Lewis, Lewis & Hale, for plaintiffs.

Silverthorn & Hurley, for defendants.

BUNN, J.—This case was tried before the court without a jury, a jury having been waived by the consent of parties in open court. There is no dispute about the facts. On December 17, 1880, defendants made an order in writing upon the plaintiffs, signed by them, which was delivered to and accepted by the plaintiffs, as follows:

"WAUSAU, WISCONSIN, December 17, 1880.

"JAMES LEFFEL & Co., SPRINGFIELD, OHIO. You will please manufacture and ship to the undersigned, at Wausau, Wisconsin, Marathon county, one of your 66-inch Leffel water-wheels, running with sun. Bore top half of coupling 5⅞. Wheel to be shipped by the 15th day of February, 1881. To drive gang-mill situated at Wausau, Wisconsin, and displaces —— wheel under 10 feet head and fall.

"In consideration of which the undersigned agree to pay, with exchange, besides freight from manufactory, the sum of $950; $300 cash, balance in good notes, drawing 7 per cent. interest, payable in six and nine months from date of shipment. After the wheel has run 30 days, they want privilege of taking up notes at a discount of 3 per cent.

(Signed) "CLARK, IRELAND & Co., WAUSAU, WISCONSIN."

This order was, on the day of its date, delivered by defendants to D. J. Murray, residing at Wausau, who was acting as local agent of plaintiffs in taking orders for plaintiffs for the manufacture of machinery, and forwarded by him on the next day to the plaintiffs, at Springfield, Ohio, who received it by due course of mail on December 20, and on that day or the next proceeded to manufacture the wheel, which they completed according to contract in about 12 or 15 days from the receipt of the order, and on the 13th of January shipped it to the defendants, at Wausau, according to the directions in the order, notifying defendants of its shipment, and inclosing blank notes for them to sign and return. The wheel reached the railroad depot in Wausau by due course of freight, where the defendants saw and had a chance to inspect the same; but they refused to receive the wheel or to pay the purchase price. This action is brought, setting forth all the facts, to recover the amount of the contract price of the machinery, either as upon the sale and delivery of the goods manufactured, or as damages for non-performance of the contract on defendants' part.

Defendant John Clark testifies that about December 20, he went to the agent, Murray, who had taken the order, and told him that he was negotiating with C. P. Hazelton for a second-hand wheel, and wanted him to hold on to the order, and told Murray to write to plaintiffs at Springfield to delay the manufacture. On December 30, Murray wrote as follows to plaintiffs:

"WAUSAU, WISCONSIN, December 30, 1880.

"GENTS: Messrs. Clark, Ireland & Co. came here and requested me to write to you and say they think of purchasing a second-hand wheel, and would ask you to hold on with the order for the 66-inch wheel. You had better write them. The matter is in your hands.

"Yours, truly, D. J. MURRAY."

This letter was received by the plaintiffs at Springfield on January 3, and an answer by letter returned by them on that day to defendants stating that they were not willing, under the circumstances, that defendants should purchase anything but the Leffel wheel, and that they were not disposed to give up a contract upon which they had already done considerable work; that they expected to complete and ship their wheel at the time agreed in the contract. The wheel at this time was in course of manufacture, and about half done. This letter was received by the defendants at Wausau on January 5, and on that day they wrote themselves to the plaintiffs as follows:

"WAUSAU, WISCONSIN, January 5, 1881.

"JAMES LEFFEL & Co., SPRINGFIELD, OHIO—Sirs: Yours of the 3d received. We ordered through Mr. Murray, your agent, a wheel, and a day or two after we told him to notify you to hold on with the order, as we were not positive we wanted it. You sold C. P. Hazeltine & Co. a wheel of that size and kind which he designs to take out, and use steam instead, and we have been negotiating with them for the wheel, pinions, core-wheel, and shafting; and, if he finally concludes to put in steam, we shall buy of him, and do not want your wheel; and, if he does not make the contemplated change, we want the wheel of you. If you want to deal that way, all right; if not, you can consider the order countermanded now, and we will take our chances of getting a wheel

that will suit as well as yours. The wheel Mr. Hazeltine has got is your make of wheel, and if he does not want to use it you ought not to stop his selling it by crowding. Will let you know within 10 days the result of trade with Hazeltine.

"Yours, respectfully, CLARK, IRELAND & Co."

When this letter was received by the plaintiffs, on January 8, the wheel was nearly completed.

The plaintiffs' testimony shows that this wheel was unusually large, and they did not keep such in stock, and only made them to order; that 44-inch wheels were as large as they kept in stock, and that it was only occasionally that they had an order for so large a one as this; that it consisted of some 20 large castings and a great many small pieces, and that it would ordinarily require considerable change to fit another customer if they found one wanting so large a one; that some of the wheels ran with and some against the sun, and that a wheel made to run with the sun could not be made to fit with machinery that was intended for the other kind.

The defendants had ample opportunity to inspect the machinery at Wausau, and there is no point made that it was not manufactured and shipped according to the contract. It is admitted also that the defendants have broken their own contract in *toto;* but they insist that the plaintiffs are not entitled to recover the full value of the machinery, but only the difference between the contract price and the market price, leaving the wheel for plaintiffs to dispose of as best they may, and that they are not entitled to recover at all in this suit.

But whether or not that rule be more properly applicable in cases of stocks or ordinary merchandise already in existence when the contract is made, and which has some certain market value, it seems quite clear to me that it is not the one which metes out the most exact justice between the con-

tracting parties in a case of this kind, or which is best sustained by reason or authority.

In the first class of cases the authorities are divided; some holding, as in *Thorndike vs. Locke*, 98 Mass. 340, and *Pearson vs. Mason*, 120. Mass. 53, that the vendor of the goods, upon tender made of delivery and refusal to receive, may leave the goods with the vendee, or with some person for him, and recover the contract price; or that he may keep the goods and recover as damages the difference between the contract price and the market value at the time of the breach; or that he may resell the goods and charge his vendee with the difference between the selling and contract price; while other cases, as in *Gordon vs. Norris*, 49 N. H. 376, confine the vendor to the last two remedies named, and deny him the first, on the ground that, the defendant refusing to accept, no title passes and the vendor cannot have the goods and their value.

But where a person orders an article to be manufactured according to a certain measure, pattern, or style, as a suit of clothes, or a carriage, or a steam-engine, here, I think, the weight of authority and the best reason concur that the manufacturer, after he has completed his contract and tendered the article, is entitled to recover the contract price,

The reason for the distinction is that in such a case there is presumably no certain market value for goods made according to such a specific order, and that the manufacturer having done all that is required of him to do to entitle him to the full benefit of his contract, he cannot, with any certainty, have this full benefit in any other way. If he was required to resell an article of this kind before he could maintain his action, he might be compelled to wait until the vendee should become irresponsible, and the article might have no market value, or no appreciable value at all, for any other person except the one ordering. In such a case it seems more just

and equitable that the loss and inconvenience of having a cumbrous article like the one in suit on hand for sale, and taking the chances of finding a purchaser, should fall upon the party who is in fault in not fulfilling his contract, rather than upon the party who is in no fault, and is claiming nothing but just what the other party has agreed to do.

It may be that if the defendants had countermanded the order before any work had been done, and especially if they had also tendered to the plaintiffs the fair profits of the manufacture, that it would have been the duty of the plaintiffs to have desisted from going on with the work. But when the letter from Mr. Murray was received the work was in progress and about half completed; besides the defendants did not remand the order, nor in any way attempt to rescind their contract, but simply requested the plaintiffs to delay the manufacture until they could have time to see if they could consummate a trade with another party to better advantage. If they could not, they still wanted the wheel. It is evident that the plaintiffs were not bound to delay the manufacture for such a purpose. If it takes two to make a contract; it also takes two to rescind or modify one. I think the plaintiffs were justified in continuing the work, and shipping the wheel according to the terms of the contract.

Many of the cases on this subject turn upon a mere question of pleading; as whether, where there is no delivery and no title passes, the vendor can maintain assumpsit for the purchase price as upon a sale. There is no question of that kind here. The facts are all set up, and the plaintiffs are entitled to such relief as the facts seem to justify, whether it be a judgment for the purchase price, as in assumpsit, or for damages for a non-fulfillment of the contract on defendants' part. And the case does not turn in my judgment upon the question as to whether the title to the goods has passed from plaintiffs to defendants. If the plaintiffs

have fulfilled their contract, and delivered or tendered delivery, this is all they can do; and if defendants refuse to accept the goods, and being made to order, they are, presumably, not marketable, I think the plaintiffs are entitled to recover, as their true measure of damages for non-fulfillment, the contract price of the article, though it be conceded that no title has passed. The title, I think, in such cases would pass upon the rendition of judgment.

But is it clear that no title has passed? It is shown that the wheel was manufactured and shipped on board the cars at Springfield according to the contract. This was all the plaintiffs could do, and it seems to be the delivery contemplated by the parties; and as further confirmation of this, they provided for interest on the notes from the day of shipment at Springfield. Undoubtedly the defendants had the right to inspect the goods upon their arrival at Wausau, and upon inspection, if they found them not in compliance with contract, they would not be bound to pay for them. But, as the case stands, it is just the same as if defendants had inspected them, and found them in compliance. They had the opportunity to inspect them, and they make no point that the goods are not perfect, but only that they had changed or might change their minds about wanting them, and had notified the plaintiffs to withhold the manufacture until further orders. The general rule is in such cases that no title passes until the goods are manufactured and delivered, or are ready for delivery. These were certainly ready for delivery, and I think it not at all clear that they were not delivered when shipped at Springfield, subject only to defendants' right of inspection and rejection of the goods at Wausau, in case they should be found not to comply with the contract. However this may be, I think the plaintiffs entitled to recover the contract price of the goods, with interest at 7 per cent. from the time of shipment. *Bement vs. Smith*, 15 Wend.,

493; *Ballentine vs. Robinson*, 46 Pa. St., 177; *Shawhan vs. Vannest*, 25 Ohio St., 490.

In this last case, which was recently decided by the Supreme Court of Ohio, the authorities are so fully and ably reviewed that no further discussion of them seems necessary.

CAROLINE M. FORSYTHE *et al.* vs. JOHN O. PIERSON *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—JANUARY, 1882.

IN EQUITY.

1. PRACTICE—SERVICE OF NON-RESIDENT DEFENDANTS IN CHANCERY.—Under the Act of March 3, 1875, section 8, which provides a method for the service of non-resident defendants in certain chancery suits, it is not necessary that there shall be a marshal's return of "not found" in the district where the suit is brought before the court can make the order directing the absent defendants to appear by a certain designated day. Such order may be made upon a proper showing by affidavit filed at the commencement of the suit.

2. RETURN DAY NEED NOT BE RULE DAY.—It is not necessary that the day designated for such non-resident defendants to appear and plead shall be a rule day. The court may fix upon any certain day to be set out in the order.

3. SERVICE OF ORDER FOR APPEARANCE—BY WHOM MADE.—Such order is not a subpœna or process within the meaning of rule 15 or 17 which requires that the service of all process shall be by the marshal of the district, or by his deputy, or by some one specially appointed by the court. The statute does not require any particular mode of service or proof of service. If it is made to appear that each of such defendants was actually served personally with a copy of such order, that is sufficient.

4. SAME.—In this case, service of the order was made by the marshal, or his deputy, of the district where such defendant was a resident.

J. R. Doolittle, Jr. and *McDonald & Butler*, for complainants.

Baker, Hord & Hendricks, for intervening petitioners.

Grant, Swift & Brady, for defendants.

GRESHAM, J.—The complainants filed their bill of complaint against the defendants on the 11th day of November, 1881, to enforce their right to redeem certain real estate, situated in Indiana, from a mortgage, both of which are described in the bill. At the same time the East Chicago Improvement Company filed its intervening petition setting up that it was the owner of the mortgaged premises by *mesne* conveyances from the complainants, who were the mortgagors, and that it desired to make various permanent and expensive improvements upon the premises, which could not be made while the mortgage remained upon the property. The petitioner paid into court $75,000, which, added to $135,000 already paid in by the complainants, was, the petitioner averred, more than sufficient to pay the amount that was claimed to be due upon the mortgage. The prayer of the intervening petition was that the lien of the mortgage should be transferred from the lands to the fund in the registry of the court, and that the mortgagees should be decreed to enter satisfaction of their mortgage.

At the time the bill and intervening petition were filed, J. R. Doolittle, Jr., Esq., one of the complainants' solicitors, filed his affidavit describing the complainants' cause of action, and stating that John O. Pierson, one of the defendants, was a resident of the city of Chicago and state of Illinois; that the Continental Life Insurance Company was a citizen of the state of Connecticut, and that certain other defendants were citizens of Boston, in the state of Massachusetts; that neither said non-resident defendants, nor either of them,

could be found in the district of Indiana, nor did they, or either of them, voluntarily appear to the complainants' bill of complaint. On the information contained in this affidavit the court entered an order that the defendants named in the affidavit appear and plead, answer or demur, to the bill and intervening petition on or before the 7th day of December, 1881, and that a copy of the order should be served upon each of such defendants. Certified copies of this order and the bill of complaint and intervening petition were served upon the Continental Life Insurance Company, in Connecticut, on the 16th day of November, 1881, by the marshal for the district of Connecticut.

Samuel C. Hayes, in an affidavit in which he describes himself as deputy United States Marshal for the northern district of Illinois, swore that he made similar service on John O. Pierson on the same day. And B. B. Johnson made affidavit of similar service at Boston on the 17th day of November, 1881, on the defendants who were citizens of that place, describing himself as deputy marshal for that district. Mr. Johnson also indorsed the usual return of service upon the certified copies of the order, bill, and intervening petition, which were placed in his hands as deputy United States Marshal for the district of Massachusetts.

The defendants now appear specially and move to set aside the order of the court and the service of the same, for the reason that the order was prematurely made; that it was not based upon proper information; that the day designated for the defendants to appear and plead was not a rule-day; that the service should have been by the marshal of this district, or by a person specially named in the order to make the service; and that the intervening petition is not such a proceeding as is contemplated by the Act of March 3, 1875. This act provides that when any defendant in a suit in equity to enforce any equitable lien or claim against real or per-

sonal property in the district where the suit is brought is not an inhabitant of nor found within the district, and does not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant to appear and plead, answer or demur, to the complainant's bill on a certain day therein to be designated; and the said order shall be served on such absent defendant wherever found, or where such personal service is not practicable shall be published in such manner as the court shall direct. If the absent defendant fails to appear and plead within the time limited, the court is authorized to entertain jurisdiction and proceed to the hearing of the suit.

The Act is silent on the subject of the evidence that will authorize the making of an order for substituted service. The marshal's return to a subpœna that one or more of the defendants cannot be found within the district would, no doubt, authorize the court to enter such an order. But this is not the only evidence that will authorize the court to enter an order for substituted service. An affidavit such as was produced in this case is sufficient evidence that the defendants named in it are not inhabitants of the district. When it is made to appear at the commencement of the suit, or at any subsequent time, that a defendant is not an inhabitant of the district, and cannot be found within it, and will not, or does not, voluntarily appear to the suit, an order may be entered specifying a day for such defendant to appear and plead, answer or demur. It is not necessary to wait and see if the absent defendant will not voluntarily enter his appearance, or that he may be found and personally served with process in the district. It is urged that equity rule 17 fixes the appearance day for defendants in all equity cases. "The appearance-day of the defendants," says this rule, "shall be the rule-day after the subpœna is made returnable, provided he has been served with the process

twenty days before that day. Otherwise the appearance-day shall be the next rule-day succeeding the rule-day when the process is returnable."

The act says the absent defendant shall be ordered to appear on a day to be designated in the order—not on a rule-day. And, furthermore, the order for the appearance of the absent defendant is not a subpœna or process within the meaning of rule 17 or rule 15, which provides that the service of all process, *mesne* and final, shall be by the marshal of the district, or by his deputy, or by some other person specially appointed by the court for that purpose. The language of the act is: "And the said order shall be served on such absent defendant, if practicable, wherever found; or, when such service is not practicable, shall be published in such manner as the court shall direct." The order is nowhere referred to as process, and no particular service or proof of service is required. The residence of each of the absent defendants was given in Mr. Doolittle's affidavit, and it was, therefore, practicable to serve each of them personally with a copy of the order, which was done. I think the act has been sufficiently complied with to give the court jurisdiction over the property described in the bill, and the rights of the absent defendants thereto. If it becomes necessary, the question arising in connection with the intervening petition can be determined hereafter.

Motion overruled.

CHARLES HATCH *vs.* THE INDIANAPOLIS AND SPRINGFIELD RAILROAD COMPANY *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—JANUARY, 1882.

IN EQUITY.

1. PRACTICE—EXCEPTIONS TO MASTER'S REPORT.—Where a reference is made to a master, which embraces questions of law as well as of fact, and after hearing the testimony and the arguments of counsel, the master prepares his report, it is not necessary to observe the formality of taking exceptions to the report before the master, prior to bringing the exceptions before the court.

2. PARTY CANNOT INSIST UPON ARGUING EXCEPTIONS BEFORE MASTER.—It is not the practice in this circuit, for a master after hearing full arguments, to submit a draft of his report to the parties, in order for them to make objections thereto; and the parties have no legal right to make objections to the draft of the report, and argue the same before the master.

3. CONSTRUCTION OF EQUITY RULES.—The Supreme Court in adopting the Equity Rules, intended to dispense with the old formalities incident to settling the master's report and entering exceptions thereto.

Motion to recommit report to master.

Edwin H. Abbot and *C. D. Page*, for complainant.

Baker, Hord & Hendricks, Roach & Lamme and *James M. Johnson*, for defendants.

GRESHAM, J.—The bill in this case alleged that the railroad company was indebted to the complainant in a large sum for labor and material furnished in the construction of a part of the defendant railroad; that certain stockholders, who were made defendants, had never paid their stock subscriptions, and

that the company was insolvent, and the road had been abandoned. The court was asked to ascertain and decree the amount due from the company to the complainant; also for a decree against the individual stockholders, requiring them to pay into court a sum sufficient to satisfy the complainant's demand and costs of suit.

After the case was put at issue, it was referred to the master to take and report the testimony and a finding thereon. Both parties appeared before the master and took testimony without objecting to the terms of the reference. Having heard the arguments of counsel on both sides, the master prepared his report and filed it in the clerk's office on the 24th day of August, 1880. This was done without notice to either party that the report was ready to be filed. The same day, or within a day or two thereafter, the complainant's counsel were furnished with a copy of the report. Nothing further was done in the case until the 23d day of September, when the complainant's counsel filed a written motion to recommit the report to the master for review, because the master had gone beyond the matters to him referred, had omitted to report upon divers matters properly included in the reference, and had filed his report without submitting the same in draft to the complainant and allowing him opportunity to make his objections thereto, and thus lay the requisite foundation, under the rules and practice established by the Supreme Court, for taking valid exceptions to the report if the master should overrule any of said objections.

It is urged by plaintiff's counsel that, after writing out his report, and before filing it in the clerk's office, the master should have notified counsel that it was in draft, thereby affording them opportunity to point out supposed errors, and make objections to his conclusions, so as to give him an opportunity of considering and correcting his report, and that no exceptions, according to correct chancery practice, can be

heard by the court which have not been carried in before the master.

It is also further urged by the counsel that the equity rules do not cover all the details of equity practice, and that this is evident from Rule 90, which adopts the English practice in omitted cases, as it was known and understood when the equity rules were adopted. These rules were promulgated by the Supreme Court and took effect on the 2d day of August, 1842. It seems to have been the practice in England for some time before our equity rules were adopted, that a party should never except unless he had first objected to the draft of the report before the master, and when there was no objection brought in, it was allowed good cause to discharge the exception. That being the practice, of course, the unsuccessful party was entitled to notice that the report was in draft.[1] This seems to be recognized as the correct practice in some of the courts of this country.[2]

In *Story vs. Livingston*, 13 Peters, 359, the court says: "Strictly in chancery practice, though it is different in some of our states, no exceptions to a master's report can be made which were not taken before the master, the object being to save time and to give him an opportunity to correct his errors or reconsider his opinion: Dick. 103. A party neglecting to bring in exceptions, cannot afterwards except to the report: Harr. Ch. 479; unless the court, on motion, see reason to be dissatisfied with the report, and refer it to the master to review his report, with liberty to the party to take objections to it: 1 Dick. 290; Madd. Rep. 340–355. But without restricting exceptions to this course, we must ob-

[1] 2 Daniels, 1483, 2d Am. Ed.

[2] *Troy, etc. vs. Corning*, 6 Blatchford, 328; *Gaines vs. New Orleans*, 1 Woods, 104; *Church vs. Jaques*, 3 Johnson's Chancery, 77; *Cleaves vs. Ferguson*, 2 Tennessee, Ch. 589; *Gordon vs. Lewis*, 2 Sumner, 143; *Byington vs. Wood*, 1 Paige, 145.

serve that exceptions to a report of a master must state, article by article, those parts of the report which are intended to be excepted to." While the practice contended for by the complainant is here referred to as correct, according to strict rule, the court declined to enforce it against the excepting party.

McMicken vs. Perin, 18 How. 507, was decided in 1855, some years after the adoption of the equity rules, and without alluding to rule 83. After referring to *Story vs. Livingston* as deciding that no ojections to a master's report can be made which are not taken before the master, the court says: "The court will not review a master's report upon objections taken here for the first time." The exceptions to the master's report had not been taken in the Circuit Court, but for the first time in the Supreme Court.

The practice contended for by the complainant was referred to in *Story vs. Livingston* as being correct according to strict rules, without, however, being enforced; and in *McMicken vs. Perin*, the question was not before the court.

Masters are usually employed in taking accounts and making computations, and in making inquiries and reporting facts. In references of this character, drafts of the reports have been prepared before argument, and argument was heard before the master only on objections to the drafts. In such cases it is clear the parties were entitled to inspect the reports, and to be heard on such parts of them as were objected to. But if a reference is made embracing questions of law as well as fact, and after hearing the testimony and the arguments of counsel, as was done in this case, the master prepares a report of his findings, I can see no good reason for observing the formalities of the old practice. It resembles a trial before a referee, when the parties are fully heard, and their respective points and positions are fully stated to and understood by the trier. This case was argued at great

length before the master, and he no doubt comprehended the exact points in controversy. If the complainant's motion should be sustained, his counsel would probably go before the master, and in support of objections to the draft, again repeat the arguments that he urged in the first instance.

It is not the practice in this district, nor, as I understand, in this circuit, for the master, after hearing full argument, to prepare a draft of his report, and then notify the parties and summon them to make objections. When the case has been fully argued in the first instance, the legal right of the unsuccessful party to go before the master, make objections to the draft of the report, and argue those objections, is not recognized in practice.

The equity rules provide for conducting references before masters in a simple and expeditious manner. It is fair to assume that, in adopting these rules, the Supreme Court meant to dispense with the old formalities incident to settling the master's report. Rule 77 provides that the "master shall regulate all the proceedings in every hearing before him, upon every such reference * * * " and "the master," says Rule 83, "as soon as his report is ready, shall return the same into the clerk's office, and the day of the return shall be entered by the clerk in the order book. The parties shall have one month from the filing of the report to file exceptions thereto; and if no exceptions within that period are filed by either party, the report shall stand confirmed the next rule day after the month is expired. If exceptions are filed, they shall stand for hearing before the court, if the court is then in session; or, if not, at the next setting of the court which shall be held thereafter." Nothing is said here, or in any of the other rules relating to practice before masters, about notice to parties that the report is in draft, and to appear before the master and settle it. "As soon as his report is ready," the master shall return it into the clerk's

office, and "the parties shall have one month from the filing of the report to file exceptions thereto." The report is ready, within the meaning of Rule 83, when it is written.

It is not necessary to refer to the practice of the High Court of Chancery in England, as it existed in 1842, for the formalities attending the settlement or making of master's reports, and the entering of exceptions thereto. These matters are provided for in the equity rules. I have considered the only question that seemed to be relied on in the argument of the motion. During the argument, the complainant's counsel, inasmuch as they might have been misled as to the practice in this district, were offered leave by the court still to file exceptions to the report, notwithstanding the fact that the time limited by the rule for taking exceptions had elapsed. This offer they declined. In declining it, counsel said they preferred to stand upon their legal rights.

Motion overruled.

If it be proper to except to the master's final report, for rulings on questions of evidence, it can only be done where objections of the same kind have been taken to the draft report. *Troy Iron and Nail Factory vs. Corning*, 6 Blatchford, 328. Exceptions to the report of a master cannot be taken for the first time, in an appellate court. *Canal Co. vs. Gordon*, 6 Wall. 561; *Brockett vs. Brockett*, 3 How. 691; *Kineman vs. Parkhurst*, 18 How. 289; *Hudgins vs. Kemp*, 20 How. 45, 54. [*Reporter.*

JOEL D. HARVEY, RECEIVER, ETC., vs. THOMAS LORD.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1882.

1. NATIONAL BANKS—SUITS TO ENFORCE LIABILITY OF SHAREHOLDERS—PLEA IN ABATEMENT.—Where a bill in the nature of a creditor's bill has been filed under the provisions of the National Banking law, against the shareholders of a bank to enforce their liability, a suit at law brought by a receiver appointed by the Comptroller, cannot be maintained against an individual shareholder to enforce the same liability, while the former suit is pending.

2. CHANCERY—AMENDMENT OF BILL.—Where pending the disposition of a bill in equity, a new law grants to the court enlarged powers, the complainant may file an amended bill in order to bring his suit within the provisions of the new law.

3. POWER OF COMPTROLLER TO APPOINT RECEIVER AFTER PROCEEDINGS IN COURT.—The authority of the Comptroller to appoint a receiver to wind up the affairs of a National Bank, after a receiver has been appointed by the court and steps taken under a creditor's bill to enforce the shareholders' liability, *doubted*.

E. G. & A. B. Mason, for plaintiff.

F. H. Kales and *H. B. Hurd*, for defendant.

BLODGETT, J.—This is a suit at law brought by Harvey, as receiver of the Manufacturers' National Bank of Chicago, against Thomas Lord, to enforce his liability as a stockholder of the bank. To this suit the defendant has plead in abatement that on the 3d day of February, 1875, one James Irons, who was then a judgment creditor of the Manufacturers' National Bank, filed in this court a creditor's bill to enforce payment of his judgment; that such proceedings were taken in that case that Joel D. Harvey was appointed receiver of

all the property and effects of the bank, and entered upon the discharge of the duties of his office, and took possession of the property of the bank; that afterwards, on the 5th of October, 1876, an amended bill was filed in said cause to which all the stockholders of the bank were made parties, by which the complainant sought, in behalf of himself and all other creditors, to enforce the liability of the stockholders of the bank for the purpose of discharging the indebtedness of the bank; that the defendant in this suit, as one of the stockholders of the bank, was made a party to the Irons suit; that said suit in chancery is still pending, and this suit at law is brought for the same cause, and to enforce the same liability which the creditor's bill by Irons seeks to enforce as against this defendant, and, therefore, he prays an abatement of this suit.

At the time the original bill was filed by Irons, there was no express provision in the National Banking law for the enforcement of a stockholder's liability by the machinery of a creditor's bill, and the Supreme Court in *Kennedy vs. Gibson*, 8 Wall. 498, had decided that the stockholder's liability could only be enforced through a receiver appointed by the comptroller of the currency. But on June 30, 1876, Congress passed an act amendatory of the National Banking law, which provides by the second section as follows: "When any National Banking Association shall have gone into liquidation under the provisions of section 5220 of said statutes, the individual liability of the shareholders provided for by section 5151 of said statutes, may be enforced by any creditor of such association, by bill in equity in the nature of a creditor's bill brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof, in any court of the United States having original jurisdiction in equity for

the district in which said association may have been located or established."

The amended and supplemental bill was filed by Irons after the passage of this amendment, and was intended to bring all the stockholders of the Manufacturers' National Bank before the court, and to enforce their liability through the agency of the receiver appointed by the court in that case. This defendant is a party to, and has answered in that suit. About a year ago, and long after the amended and supplemental bill of Irons was filed, the comptroller of the currency appointed a receiver to wind up the affairs of this bank, and named the same person whom this court had appointed in the Irons suit, and under that appointment, acting presumably under the advice of counsel, he has brought suits at law against the stockholders. The only question is whether the suit which had been brought by Irons and which had been amended to adapt it to the provisions of the act of June 30, 1876, can be pleaded in abatement to this suit at law, which has been instituted by the receiver under the authority or sanction of the comptroller.

After the filing of the original Irons bill, the powers of the court under such a bill were materially enlarged by the act of Congress just quoted. That bill was pending when this law took effect, and Irons undoubtedly had the right, by amendment, to make a case which would enable the court to administer these enlarged powers with which it had been clothed *pendente lite:* Story's Eq. Plead. 336; *Mix vs. Beach*, 46 Ill. 311.

It seems to me there is no room to doubt that this stockholder's liability can be completely enforced in the Irons case, and if it can, then I see no reason why the general rule that a debtor shall not be vexed by two suits in the same

jurisdiction for the same cause of action, is not clearly applicable.

I may also say, in the same connection, that I have great doubts whether the comptroller had any authority to appoint a receiver after the court had appointed a receiver, and taken steps under a creditor's bill to enforce the stockholders' liability. The statute gives the comptroller authority to appoint a receiver in certain cases, and by the amendment above quoted provides expressly that where a bank has gone into voluntary liquidation and is in process of winding up its affairs, any creditor may enforce the liability of the stockholders by a creditor's bill; and if the comptroller had not acted and appointed a receiver for the purpose of enforcing the stockholders' liability, I have no doubt but what the action of the court supersedes the action of the comptroller in the premises, and gives the authority solely to the court to enforce the individual liability of the stockholders.

It cannot, I think, be maintained that Congress intended by the act of June 30, 1876, to leave the comptroller any authority over the assets of a National Bank which had gone into voluntary liquidation under section 5220, after a court of competent jurisdiction had, under a creditor's bill, appointed a receiver, and taken possession of the assets, and initiated proceedings to enforce the liability of stockholders, because that would bring about a conflict between the officers of the court and those of the comptroller. The grant of power to enforce the liability of the stockholders is plenary and ample, and I see no need for any function of the comptroller when the affairs of the bank are once properly in the hands of the court.

The demurrer to the plea in abatement is overruled, and judgment rendered on the demurrer.

JONATHAN HANCOCK *vs.* TOLEDO, PEORIA AND WARSAW RAILROAD COMPANY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1882.

IN EQUITY.

1. REORGANIZATION OF INSOLVENT RAILROAD CO.—PROVISION FOR UNSECURED CREDITORS, AND FOR STOCKHOLDERS.—A plan for the reorganization of an insolvent railroad company, which, among other things, provides that the holders of the unsecured indebtedness shall receive second preferred income bonds of the new company at par to the full amount of their respective debts and interest, and also provides that the stockholders of the old company shall receive stock of the new company in exchange at a certain ratio,—is not fraudulent and void as to the holders of the unsecured indebtedness,

2. SAME—CONTRIBUTION OF EXPENSES.—The fact that if a holder of unsecured indebtedness avails himself of the reorganization he must contribute ratably to the necessary expenses, does not render such reorganization void.

3. *Railroad Company vs. Howard*, 7 Wallace, 392, distinguished.

John Gibbons, for complainant.

Lyman & Jackson, for defendants.

BLODGETT, J.—This is a bill filed by Jonathan Hancock, as a judgment creditor of the Toledo, Peoria & Warsaw Railroad Co., in behalf of himself and all other creditors of that company against said company, and Morris K. Jessup, Robert C. Martin, Charles E. Whitehead, William L. Putnam, and Henry Hill, a committee of the creditors of the said company.

The bill, in substance, charges that complainant on November 23, 1875, recovered in the Circuit Court of Peoria county, in this state, a judgment against the Toledo, Peoria & Warsaw Railroad Company for $3,835.35; that the railroad of the company was heavily incumbered with mortgages and other liens, and that proceedings had been instituted and were pending for the foreclosure of the mortgage liens on the property, and that the property was in the hands of a receiver appointed by this court under such foreclosure proceedings; that pending these foreclosure proceedings, and on or about the 13th day of June, 1877, an agreement was entered into between the holders of the mortgage bonds and other creditors of the corporation, whereby it was provided that the defendants, Jessup, Martin, Whitehead, Putnam and Hill should be appointed a purchasing committee; that such committee should obtain a decree of foreclosure in the suits then pending, under which all and singular the railroad, rights, privileges, franchises and property of the company should be sold and the same should be purchased at such sale by the committee for and in behalf of all the holders of bonds, stocks and indebtedness of the company. That a new corporation should be organized, under the laws of the state of Illinois, to own, operate and control such railroad franchises and property which should bear the the name of the Toledo, Peoria & Western Railroad Company; that the holders of the bonds, indebtedness and stock of the old company should deliver the same to the Farmers' Loan and Trust Company of New York, subject to the order of the committee; that the committee should convey the title to the railroad, its franchises and appurtenances so purchased by them, to the new corporation, and the new corporation should make a mortgage on the same to secure 4,500 bonds of $1,000 each; also a second mortgage to secure $3,900,000—$2,900,00 of which should be called First Pre-

ferred Income Bonds, to be issued in sums of $1,000 each; $1,000,000 of said bonds to be called Second Preferred Income Bonds, to be issued in sums of $1,000 each; and that the new corporation should also issue 30,000 shares of stock of the par value of $100 per share, making a total of $3,000,000 of stock.

That the holders of the mortgage bonds of the old company should receive in place of their old securities the new bonds secured by the first and second mortgages, at certain rates fixed by the agreement.

That the holders of the floating debt of the old company, (which means we assume the unsecured indebtedness of the company, including this complainant,) should receive on surrender of their evidences of indebtedness, Second Preferred Income Bonds of the new company at par, to the full amount of their respective debts and interest.

That the holders of the First Preferred stock of the old company should receive on the surrender of the stock certificates to the committee, stock of the new company to the amount of 50 per cent. of their old stock; holders of the Second Preferred stock should receive stock of the new company to the amount of 30 per cent. of the old stock, and holders of the common stock of the old company should receive 25 per cent. in stock of the new company.

In his original bill, complainant stated the substance of this agreement in a very meager and imperfect manner, because, as he charged, the agreement was in the hands of defendants and he was unable to procure a copy. He has since obtained a copy of the agreement, and filed an amendment to his bill with a copy of said agreement, so that the agreement itself is now before the court for construction.

The bill charges that this scheme or plan of reorganization is fraudulent as against the creditors of the old company, and seeks to have the stock of the new company, provided in the

agreement to be issued to the stockholders of the old company, placed in the hands of a receiver and sold, and the proceeds applied to the payment of complainant's judgment, and that of such other creditors as shall come in and be made parties hereto.

The solicitor for complainant insists that he makes just such a case here as was shown in *Railroad Company vs. Howard*, 7 Wall. 392. That case involved a contract made under circumstances similar to this between the bondholders and stockholders of the Mississippi and Missouri Railroad Company of Iowa, whereby the road of the company was to be sold under a decree of foreclosure to be procured, and bid in by a committee for a fixed sum, $5,500,000, which was to be distributed among the bondholders and stockholders, in such proportions that the stockholders should receive 16 per cent. of the par value of their stock, either in money or bonds. This agreement was attacked by the holders of certain unsecured indebtedness of the company, on the ground that it was fraudulent as against them.

The Supreme Court held that plan of reorganization void, because it made no provision for the payment of the unsecured creditors, saying: "Mortgage bondholders had a lien upon the property of the corporation embraced in their mortgages, and the corporation having neglected and refused to pay the bonds, they had a right to institute proceedings to foreclose the mortgages, but the equity of redemption remained in the corporation. Subject to their lien, the property of the railroad was in the mortgagors, and whatever interest remained after the lien of the mortgages was discharged belonged to the corporation, and as the property of the corporation when the bonds were discharged, it became a fund in trust for the benefit of their creditors. Holders of bonds secured by mortgage as in this case, may exact the whole amount of the bonds, principal or interest, or they may

if they see fit, accept a per centage as a compromise in full discharge of their respective claims, but whenever their lien is legally discharged, the property embraced in the mortgage, or whatever remains of it, belongs to the corporation."

It will be seen that while the Mississippi & Missouri Railroad Company was largely indebted to certain unsecured creditors, no provision was made under the scheme of reorganization for any payment or security to the unsecured creditors. The plan contemplated a complete absorption into the purchasing committee, or their successors, of the entire property of the old company, free from all liens and liability for the debts of the company, but in no manner contemplated that the holders of unsecured indebtedness were to be paid in full or in part, or in anywise provided for; while the stockholders who only in equity held their interest subject to the debts of the company were to have about $550,000 divided among them.

Here, however, express provision is made for the holders of all the floating debt, by giving them in lieu of and as a substitution for their evidences of debt against the old company, Second Preferred Income Bonds of the new company equal to the amount of such floating debt and interest.

This income bond is, by the terms of the agreement, a higher grade of security than the stock of the new company. That is, the stockholders get no dividend until the interest on these bonds is all paid. The stockholders are placed behind the holders of these bonds; and the plan seems to fairly contemplate the protection of all classes of creditors of the old company in the equitable order of their priority. It was the evident purpose of the parties to this agreement, to place these floating debt holders in at least as good a relation to the new company as they bore to the old company. They got for their unsecured indebtedness something which at least bears the semblance of a security. It was a second mortgage

bond. No complaint is made of anything inequitable in the provisions by which the holders of the mortgage debt are paid in full, in the manner provided in the agreement. Nor is there any suggestion that there was any fraudulent collusion between the bondholders and stockholders to defraud the unsecured creditors.

It would seem almost obvious, from a statement of the amount of bonded and unsecured indebtedness of this old company, that it could not have been anticipated that this railroad property would or could have been sold for cash, or if a cash sale had been insisted upon, it would only have partly paid the holders of the first mortgage bonds. The plan adopted had what seems to have been a due and equitable regard for the interests of all classes of creditors and stockholders, and it does not seem that upon the statements in this bill any injustice was intended or has been done to this creditor. He undoubtedly has been offered much more than he could have got had the holders of the secured indebtedness insisted upon their full payment in cash, as they would seem to have had the right to do. If this bill had shown that this creditor had accepted the provisions made for him under the scheme or plan of reorganization, or had accepted the income bonds he was entitled to receive, and there was still a balance of his debt left unliquidated, he might, under the authority of the case which has been referred to, have had a right to call upon the stockholders to surrender the stock which it was provided they should receive as a part of this scheme. But it is not necessary to discuss that, and I refer to it only for the purpose of showing that he makes no such statement. He does not show he has accepted the provision which was made for him, and come into the scheme for the purpose of obtaining payment, as the other creditors of this corporation did, and as he might have done. If he had exhausted his remedy, he might have had a different standing with refer-

ence to the stockholders. It is true, the contract provides that all those who come into this scheme shall contribute ratably to the expenses necessary to complete this plan of reorganization. This does not seem inequitable, but, on the contrary, just and equitable, between the parties. All classes of the creditors of this company were involved in a common misfortune, and it seems to me but right that they should share in the expenses of a plan which had for its purpose the benefit of all.

The bill is, therefore, dismissed, for want of equity.

THE C. C. TROWBRIDGE.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1882.

IN ADMIRALTY.

ADMIRALTY JURISDICTION—DECLARING BILL OF SALE OF VESSEL A MORTGAGE SECURITY.—A court of admiralty has no jurisdiction over a libel which seeks to have a bill of sale of a vessel declared a mortgage and a mere security for a loan, and which asks for an accounting of the earnings of the vessel, and prays for a decree declaring the mortgage satisfied and for a reconveyance of the vessel.

This was a libel for possession of the Schooner C. C. Trowbridge, the substantial allegations being that on February 28, 1881, the libellant, Wallace Bullen, was sole owner and in possession of said schooner; that on said day he borrowed of Goodenow & Hinds, the sum of $4,000, and

as security for said loan executed and delivered to them a bill of sale of the schooner, absolute on its face, conveying to them the whole of said schooner; that said bill of sale was executed on the understanding and condition that Goodenow & Hinds should hold the schooner until such time as the amount so loaned should be repaid to them out of her earnings; that since the execution of said bill of sale, libellant has acted as master of the schooner and that her net earnings for the seasons of 1881 and 1882, have been received by Goodenow & Hinds, and are more than enough to pay the said loan and the interest thereon; that on the 27th of November last, libellant was discharged from his position as master of said vessel, and that said Goodenow & Hinds then for the first time, denied that they held the title to said schooner subject to the conditions above stated, or any conditions, and informed libellant of their purpose to take the vessel out of this district for the purpose of having extensive repairs made upon her, which repairs libellant charged were wholly unnecessary; wherefore, he prayed that possession of the schooner be delivered to him, that the court decree the transfer and bill of sale made by libellant to respondents to be only a mortgage, and that an accounting be had of the earnings of the schooner, received by respondents, and that they be decreed to pay libellants all such earnings over and above the amount of such indebtedness.

Exceptions were filed to this libel, on the ground that this court had no jurisdiction and on reference, the commissioner to whom the libel and exceptions were referred, reported that the exceptions were well taken, and recommended that the libel be dismissed. To this report libellant excepted.

W. H. Condon, for libellant.

Schuyler & Kremer, for respondents.

The C. C. Trowbridge.

BLODGETT, J.—In his report upon the exceptions to the libel, the commissioner has carefully collected and cited the authorities bearing upon the jurisdiction of courts of admiralty over controversies of this character. In passing upon these exceptions to the commissioner's report, I only deem it necessary to say briefly that, by the showing of libellant, the legal title to the schooner in question was vested in respondents by the bill of sale, and libellant only retained the equitable right to have this legal title reconveyed to him when the indebtedness for which respondents held such title as security was fully paid. He also charges that such indebtedness has been fully paid out of the earnings of the schooner, but the legal title still remains in respondents, with equitable right as the libellant now insists, to have the possession delivered to him, and the legal title reconveyed to him.

This is not a maritime contract, that is, a contract to be performed upon the high seas, but it is merely a loan of money for the payment of which the schooner was conveyed as security. It is settled that admiralty has no jurisdiction to foreclose a mortgage on a vessel by decreeing a sale, or by decreeing the ship to be the property of the mortgagees, and directing the possession to be delivered to them. The mere mortgage of a ship, other than that of hypothecated bottomry, is not a maritime contract and the remedy is in equity: *Bogert vs. The John Jay*, 17 How. 399.

So a lien specifically reserved on a vessel by a contract with the builder which, in legal effect, amounts only to a mortgage, cannot be enforced in a court of admiralty: *People's Ferry Co. vs. Beers*, 20 How. 393.

A court of admiralty has not jurisdiction of a proceeding *in rem* or *in personam* by one having a mere equitable title to a share of a vesssel, but not in position to obtain possession and have specific performance: *Andrews vs. Insurance*

Co., 3 Mason, 16; *The Ives*, Newb. 205; *Davis vs. Child*, 2 Ware, 78.

Nor will a court of admiralty take jurisdiction of a libel *in personam* which seeks an accounting for the proceeds of a voyage: *Durye vs. Elkins*, Abbott's Ad. R. 529; *The William D. Rice*, 3 Ware, 134; *The Larch*, Ibid. 28.

And admiralty takes jurisdiction of petitory suits for possession of vessels only in cases where the legal titles are involved: *Kellum vs. Emerson*, 2 Curtis, C. C. 79.

The transactions set out in the libel showing that libellant only claims an equitable title to this vessel, there can be no doubt, in the light of the authorities above cited, and they are only a few of many to the same purport, that this court has no jurisdiction to try the question involved in controversy. We cannot decree an accounting between these parties and direct and enforce a reconveyance of the schooner to libellant, if upon such accounting we find that the indebtedness has been fully paid, but must leave the adjustment of such controversies to the more ample and flexible powers of a court of equity.

The exceptions to the commissioner's report are overruled and the report confirmed.

Admiralty has no jurisdiction in matters of account between part owners of a vessel. *Hall vs. Hudson*, 2 Sprague, 65; *Orleans vs. Phœbus*, 11 Pet. 175; *United States vs. The Isaac Hammett*, 4 Western Law Monthly, 486; *The Marengo*, 1 Am. Law Review, 88. Nor in a question of partnership in the earnings of a vessel. *Ward vs. Thompson*, 22 How. 330; *Kellum vs. Emerson*, 2 Curtis, C. C. 79. So where a seaman agrees to serve for one-half of the earnings, he cannot maintain a suit *in rem* to compel an account. *The Fairplay*, 1 Blackford and Howland, 136. And a libel *in rem* will not lie to enforce payment of money advanced on the personal credit of the master or owner. *The Atlantic*, Newb. 514. [*Reporter*.

MORRIS L. LEOPOLD vs. STEPHEN R. GODFREY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1882.

IN EQUITY.

1. CONCURRENT JURISDICTION—PRIORITY OF EXECUTION.—When executions issue from both the State and Federal Courts, the one under which a seizure is first made will prevail and hold the property, although the execution of the other may have been placed first in the hands of the officer.

2. LIEN OF LANDLORD.—A landlord has no lien upon the personal property of his tenant prior to the actual levy of his distress warrant.

The facts in this case were that the complainant, Leopold, on March 4, 1880, recovered a judgment in this court for $3,588.54 and costs, against Stephen R. Godfrey. The execution was delivered to the marshal, and a levy was made on a stock of goods in a store at Rockford, which had belonged to and been in the possession of Godfrey up to February 28, 1880, when he had made a pretended sale and delivery to his son, William H. Godfrey, and William B. Shaut, who had been an employé. The bill charged that this sale was fraudulent and void, and prayed that it be set aside, and the property applied to the payment of complainant's judgment.

Then Mary A. Godfrey, wife of Stephen R. Godfrey, filed a cross-bill alleging that she had recovered a just judgment March 1, 1880, against her husband in the Winnebago County Circuit Court for $3,500, and issued execution on the same day to the sheriff of that county; that her

execution was a lien on the property from the date of its receipt by the sheriff, and a prior lien to that of the Federal Court judgment; and she therefore prayed that the amount of her execution be first satisfied. Jonathan Peacock, the landlord of the Godfrey store, also filed a cross-bill, claiming $187.50 rent under a written lease dated March 1, 1878. He claimed that under this lease he had a first and valid lien on the property.

Tenney, Flower & Cratty, for complainant.

E. H. Baker, for Mary A. Godfrey.

N. C. Warner, for Jonathan Peacock.

C. M. Brazee, for Godfrey & Shaut.

BLODGETT, J.—The evidence satisfies me that the sale by Godfrey to his son and Shaut was void for want of consideration, no cash having been paid, and the $6,000 worth of notes which were given not having been taken up. It will, therefore, be set aside as a fraud upon the creditors.

As to Mrs. Godfrey's claim, the rule is well settled that when executions issue from the State and Federal Courts, if there be no lien by the judgment, the one under which a seizure is first made must prevail and hold the property. Here there was no lien by virtue of the judgment, and as the lien of sheriff and marshal were concurrent, the one who perfected his lien by actual levy, as did the marshal, must hold. The cross-bill of Mrs Godfrey must therefore be dismissed.

As to Peacock's claim for rent, the law in this state is that the landlord had no lien under the statute or the covenants in his lease upon the personal property of his tenant prior to the actual levy of his distress warrant. As the levy of

the marshal was prior to that of the landlord, Peacock's cross-bill must also be dismissed. The goods having been sold in the mean time under an interlocutory order, and the proceeds paid into court, a decree will be entered that the fund, less costs taxed, be paid to the complainant.

CHARLES OSGOOD *vs.* ROBERT ARTT.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1882.

1. STATUTE OF LIMITATIONS—CONSTRUCTION OF ILLINOIS STATUTES.—Section 18 of chapter on Limitations, Revised Statutes of Illinois, which provides that the time of the absence of a debtor from the state shall not be considered part of the time limited for commencing an action against him, is modified by section 20 of the same chapter which provides that if an action cannot be maintained in the state where it arose, by reason of the lapse of time, then it cannot be maintained in Illinois.

2. WHEN AN ACTION IN ONE STATE WILL BE BARRED BY STATUTE OF LIMITATIONS IN ANOTHER.—And where the maker of a note was residing in Illinois when the note became due, and afterwards moved to Missouri and resided there for the period fixed by the statutes of that state as a bar to an action upon such note, and subsequently returned to Illinois, it was *held*, in an action brought in Illinois upon the note, that section 20, above, applied and not section 18, and that the action was barred in that state, by being barred in Missouri.

Grant, Swift & Brady, for plaintiff.

Edsall & Hawley, for defendant.

BLODGETT, J.—This is a suit upon a promissory note made by defendant, dated May 14, 1856, by which he agrees to pay the Racine & Mississippi Railroad Company, or order, twenty-

five hundred dollars, with interest at the rate of ten per cent. per annum, at the office of the company, in the city of Racine, Wisconsin, in five years from date.

The 4th, 7th, and 9th pleas allege, in substance, under different forms of statement, that at the time of making the note, and until long after its maturity, defendant was a resident of the state of Illinois; that on the 9th of January, 1870, he removed from the state of Illinois to the state of Missouri, from which time he has continuously resided in the latter state, and been at all times liable to a suit on said note in the courts of said state; that by the laws of the state of Missouri, the plaintiff's right of action is barred in ten years from the time the cause of action accrued thereon, and that at the time the suit was commenced, defendant had been, for more than ten years, a resident in Missouri and liable to suit on said note in such state, wherefore, he insists that plaintiff's right of action is barred.

The demurrers filed to the 7th and 9th pleas, and to the replications to the 4th plea, raise the single question, whether the facts set up in these pleas are a good bar to this action under the Limitation laws of this state.

Section 20, of chap. 83, Rev. Stat. of Illinois, title Limitations, reads as follows:

"When a cause of action has arisen in a state or territory, out of this state, or in a foreign country, and by the laws thereof an action cannot be maintained by reason of the lapse of time, an action thereon shall not be maintained in this state."

This section was first introduced into the Limitation laws of this state in the act of April 4, 1872; before that time the Legislature had somewhat approached the principle embodied in this section by enacting in the act of April 13, 1849, that all actions founded on any promissory note, executed, entered into, or accrued beyond the limits of this state,

should be commenced within five years next after such cause of action should have accrued. And by the act of February 19, 1859, the words "cause of action accrued" were defined to mean the time when an action might have been commenced, "whether in this state or elsewhere." But saving this exceptional legislation, the rule laid down in *Chenot vs. Lefevre*, 3 Gilman, 637, that the bar of the statute can arise only by a continuous residence within this state from the time the right of action accrued until the bar is complete, had been the settled law of this state up to the act of April 4, 1872; but by the section now under consideration, the legislature evidently intended that when a debt had become barred by the operation of the laws of another state or country the debtor, if sued in this state, could successfully plead such bar.

The plaintiff, however, insists that this case does not come within the scope of the 20th section, because the cause of action accrued upon the note in this state; that the defendant resided in this state when the note fell due, and the statute of this state had commenced to run, but the bar had not become complete when defendan removed to Missouri; and therefore, the case comes within the operation of the 18th section of chapter 83, which provides that "if, after a cause of action accrues, the debtor departs from and resides out of this state, the time of his absence is no part of the time limited for the commencement of the action." And plaintiff argues that as the defendant was once within the jurisdiction of this state, and the statute of this state began to run here, the defendant cannot by a removal to another state, where the time for barring the action is shorter than here, avail himself of the statute of such state as a defense here.

But it seems to me the two sections referred to must now be read together, and the last clause of the 18th section,

which is as old as the Revised Statutes of 1827, must, by the operation of the 20th section, be held to mean that the time a defendant is absent from this state after the cause of action accrues is no part of the time limited for the commencement of the action, unless the defendant resides in another state or country long enough to bar the action by the laws of such state or country.

In *Hyman vs. McVeigh*, 10 Legal News, 157, the Supreme Court of this state held that the words "when a cause of action has arisen," as used in this 20th section, "should be construed as meaning, when jurisdiction exists in the courts of a state to adjudicate between the parties upon the particular cause of action, if invoked, or, in other words, when the plaintiff has the right to sue the defendant in the courts of the state upon the particular cause of action, without regard to the place where the cause of action had its origin."

The pleas show that the defendant removed into and became a resident of the state of Missouri after the note was due; the plaintiff had a right to sue at once in the courts of that state, and the cause of action, in the light of the authority just cited, arose in the state of Missouri as soon as the defendant was subject to suit there. The statutes of that state bar an action on a contract like this in ten years from the time the cause of action accrued in that state: Wagner's Statutes of Missouri, chap. 89, art. 2, section 9.

If, therefore, the plaintiff allowed his debtor to remain in Missouri without suit until the bar under the laws of that state became complete, then, it seems to me that if the defendant returns into this state, either temporarily or to reside permanently, he comes back clothed, under the provisions of section 20 of our statute, with the protection he has obtained under the laws of Missouri. The plaintiffs were not residents of this state at the time defendant left and went

to Missouri, and cannot be said to have been awaiting here the return of their debtor, and for aught that appears, plaintiffs could have brought suit in Missouri at any time while defendant was residing there.

In view of the increased facilities which have been developed within the last few years for communication between the states, and for bringing suits by non-residents, I think the Legislature of this state meant to say that a creditor who allows a debtor to reside in any state until his debt is barred by the laws of that state, should not have his right of action revived by the debtor's removing into this state, even though he may have been once a resident of this state, and subject to suit here.

I can see no reason of public policy or principle which should withhold the protection of this statute from this defendant, and yet should give it to a debtor who has contracted a debt in Missouri and remained there till an action is barred by lapse of time, and then removes, or comes temporarily, into this state. In the latter case, it was conceded on the argument the statute is applicable, and I cannot conceive why it is not just as applicable when the debtor has removed from this state and remained in another until the laws of that state bar the action for lapse of time. The evident intention of the Legislature of this state was to say that the removal of debtors into this state should not revive causes of action which had become barred by the laws of other states where they had resided and been subject to suit; that the debtor brought with him the defense he had obtained by his residence elsewhere; and if a debtor leaves this state and takes up his residence elsewhere, and remains there unmolested by suit until suit is barred, it is also barred here.

I much regret that this question has not been passed upon by the Supreme Court of this state; but in the absence of any decision by our State Courts on the question, I must go

by such light as has been indirectly given by the case I have referred to, and what seems to me to have been the evident intention of the legislature.

The demurrer is overruled as to the pleas, and sustained to the replications.

LEWIS H. DAVIS *et al.* vs. NIAGARA FIRE INSURANCE COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY, 1882.

INSURANCE AGENTS—REVOCATION OF AGENCY.—When there is nothing in the original appointment of agents of an insurance company which binds the company to continue the agency for a specified time, the fact that the company in compliance with the Statute of Illinois, designated, from year to year, such persons as its agents on whom legal process may be served, does not imply any intention or agreement to continue the same persons as its agents during the ensuing fiscal year, or for any special time; and such agency is revocable at will.

Schuyler & Follansbee, for plaintiffs.

Lawrence Proudfoot, for defendant.

BLODGETT, J.—This is a suit by plaintiffs for the recovery of damages from defendant, on the ground that the defendant unwarrantably revoked the authority of plaintiffs to act as defendant's agents in the city of Chicago. The proof shows, and without dispute, that on or about February 1, 1875, the defendant appointed the plaintiffs its agents, to place risks and

transact its business in this city. A commission or appointment to the plaintiffs as such agents, was issued by the defendant, empowering them to transact the business of insurance for the defendant and as its agents, subject to the rules and regulations of the company, and instructions to be from time to time given by its officers, with no limitation as to the time the agency was to continue. The plaintiffs entered upon the performance of their duties as such agents, and from year to year, afterward, the defendant in its reports to the Auditor of this state, and in taking out its annual licenses and certificates for the transaction of business in this state, named the plaintiffs among its authorized agents. In January, 1881, defendant, by letter from its secretary to the Auditor of State, designated certain persons, among whom were plaintiffs, to act as agents of the defendant in this state, for the then ensuing year, on whom legal process could be served; and the auditor, in pursuance of this request, issued a license to the plaintiffs as such agents, and plaintiffs continued to act as such agents for defendant, up to the first day of May last, when their agency and power to act for and in behalf of defendant was revoked, and the business transferred to other persons.

The plaintiffs contend that, by the action of the company at the beginning of the year, in requesting from the auditor that they be named among the defendant's agents, they were appointed and made agents of defendant for the entire fiscal year, from the first day of January, 1881, and claimed to recover as damages the commissions they would have earned upon the business they could have transacted for the defendant during the year, basing their estimate of the probable amount of such business and earnings upon the results of their business in previous years.

Defendant insists that the appointment of plaintiffs as such agents was to continue only during the pleasure of the

defendant—that it was a delegation of power revocable at will, and that defendant could, and did, rightfully terminate the plaintiff's agency in May last.

There is certainly nothing in the original appointment or commission which expressly, or by implication seems to bind the defendant to continue the agency of plaintiffs for any specified time; nor do I think that the fact that the defendant, in complying with the statute of this state from year to year, designated the plaintiffs as its agents necessarily implied any agreement or intention to continue plaintiffs as such agents for the ensuing fiscal year, or for any special time. It would certainly be a great embarrassment to the business of all foreign insurance companies, doing business in this state, if by naming or designating any person to the auditor to act as agent for the company, such person's agency could not be terminated for twelve months, or until the end of the fiscal year. It would put the companies bound hand and foot into the hands of their local agents, and transfer the management of their affairs and business from their boards of directors and executive officers to these agents. Such a request means no more than that while the company sees fit to deal with the person named as its agent, he is to be treated as such by the auditor and the public dealing with him under the law, but it creates no obligation on the company to retain the agent for any certain time; if the appointment was revocable in the first place, it is certainly not made irrevocable by any such request to the auditor.

Plaintiffs have also offered some evidence as to promises held out to them by Mr. Goodrich, the secretary of the company, in March last, in regard to the prospects of business for the ensuing year, and indicating a change of policy as to risks, and an intention to increase their business. But this cannot be construed into an agreement to change the terms of plaintiffs' appointment from an agency at will to an agency

for a fixed term, and besides there is no proof that Mr. Goodrich had power to bind his company in any such manner.

I, therefore, conclude that this was and continued to be a mere agency at the will of the defendant, and that no right of action accrued to plaintiffs by its revocation.

Plaintiffs non-suited.

DANIEL McKAY vs. JAMES IRVINE.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY, 1882.

1. HORSE-RACING—ACCIDENTS.—The owner of a horse, who permits the horse to be entered in a race, takes all the ordinary risks of injury to the animal which are incident to racing.

2. LIABILITY OF EMPLOYER FOR INTENTIONAL ACTS OF JOCKEY.—But if a horse is intentionally fouled or purposely run against or interfered with by the rider of another horse, the employer of such rider is liable for the damages resulting.

3. NEGLIGENCE OR INCOMPETENCY OF JOCKEY—LIABILITY FOR.—So too, the employer would be liable for any palpable or clear act of negligence on the part of the rider whereby a foul was occasioned, or for employing an incompetent rider.

4. BURDEN OF PROOF—INJURY AT HORSE-RACE.—In a suit for damages where plaintiff's horse was alleged to have been killed in a horse-race, the burden of proof rests upon the plaintiff to show intentional injury or gross negligence on the part of the defendant or his jockey.

W. I. Culver and *M. O. Lewis*, for plaintiff.

S. K. Dow, for defendant.

BLODGETT, J., charged the jury as follows:

Gentlemen of the jury: This is a suit for damages alleged to have been sustained by the plaintiff from the willful or negligent act of the defendant's servant. The plaintiff claims that, on the 25th of June last, he was the owner of the thoroughbred stallion, Wolverton; that this horse was entered for a race that day at the Chicago Driving Park, near Chicago, competing with eight other horses for a purse offered by the Driving Park Association; and that the defendant was the owner of a mare called the Belle of Nelson, entered in the same race; that in the second heat of this race, the defendant's mare, ridden by his servant or employé, was by intention or negligence of the jockey or rider for the defendant foully ridden against the plaintiff's horse whereby the latter was thrown and killed.

The defendant denies that his mare was either intentionally or negligently ridden against the plaintiff's horse, and denies that the death of the plaintiff's horse was caused by any act of his jockey or rider.

If you have no knowledge of horse racing, other than that developed by the proof in this case, you must see that in a race like this, a horse is necessarily exposed to great hazard and peril. In the first place, the horses are mostly ridden by boys, who can do little in the way of guiding or controlling them, and whose chief office would seem to be to urge them with whip and spur to the top of their speed; and in the second place, the horses themselves are high-strung, nervous and excitable; and with as many competitors, as there were in this race, on a comparatively narrow track, not running in a straight line but around a parallelogram with curved or rounded corners so that at least four turns must be made, there must be great risk of collision, especially at these turns, even when the horses are fairly and carefully ridden; and those risks the owner of a horse starting

in a race, must be presumed to take. That is, he takes all the risk of accidents incident to the race; but if a horse is intentionally fouled, if it is purposely run against or interfered with by the rider of another horse, the employer of the rider who so fouls him or interferes with him, is liable for damages; and so, too, each rider is bound, as far as possible, to keep his horse from fouling with another, and his employer would be liable for any palpable or clear act of negligence whereby a foul was occasioned; but I can hardly imagine a case where there would be liability for negligence except where the rider was incompetent. The owner starting his horse in the race is bound to have a rider who is competent to such an extent as is necessary to sufficiently manage and control the horse for the purposes of the race, and the owner who starts his horse in the race with a rider incompetent to perform the duties of so guiding and controlling the horse, might be held liable for the consequences of his rider's incompetency. This question, however, does not arise in this case, as there is no charge that the defendant's jockey was not competent for the service and duty assigned to him.

The foul complained of in this case is charged to have consisted in an attempt on the part of the rider of the Belle of Nelson to take the track ahead of Wolverton, before his mare was far enough ahead of Wolverton to enable her to draw in front of him without collision. You can readily see, if a jockey attempts to take the track ahead of another horse, before his horse is a clear length ahead of the other, he runs great risk of colliding with the other horse, and if he does so collide, or if he crowds the other horse so as to impede him, or compel his jockey to hold him, or change his course for the purpose of avoiding a collision, it would be unfair, and, therefore, would be foul riding; but there may be a case where there is a clear space between the horses

sufficient to justify the foremost one in attempting to take the track, and yet at the moment the jockey of the foremost horse attempts the manœuvre, the rear horse may be pushed, or rushed suddenly up, in which event, a collision may occur by the act of the rider of the rear horse.

You will also bear in mind that, so far as danger is concerned, the rider who attemps a foul runs as great risk to himself and his own horse as he imposes on his competitor, because it is impossible to tell in advance who may be the sufferer; but this fact does not justify a jockey in attempting a foul on the ground that he risks as much as his opponent. So much as to the rules of duty and obligation which each rider, and the employer of the rider, assumes in a race like this, and is bound to observe towards his competitor.

The plaintiff has given proof tending to show that his horse had the second position in the second heat; that is, that he was started under the wire next to the horse that had the pole, and that he maintained that position and was a little behind Nero, who had the pole, and that the Belle of Nelson was a little ahead of the plaintiff's horse up to and at the first turn, which was from 150 to 200 yards from the wire; and at this point the Belle of Nelson was reined in to the left onto the plaintiff's horse, and in attempting to pass ahead of him, tripped him, and he fell and was fatally injured. The testimony on the part of the plaintiff tends to show this state of facts; this testimony comes from persons who were spectators of the race, and who, from different positions or standpoints of observation saw, or think they saw the movements of each horse and saw acts on the part of the defendant's rider which, if true, would show an intentional fouling of plaintiff's horse.

The defendant has given proof tending to show that his mare was in the lead, well ahead of Wolverton when he fell, and that his fall was occasioned either by a collision with some

other horse, or by his stumbling, or some other inherent weakness. The proof on the part of defendant tends to show that immediately after leaving the wire the Belle of Nelson and the horse Clan Alpine rushed to the front; that they became the leading horses in the race, and were clear ahead, a length or more ahead of Nero and Wolverton at the first turn, and at the time when Wolverton fell, so that a collision between Wolverton and the Belle of Nelson, according to the testimony of defendant's witnesses, was impossible; the defendant's proof, as I have said, tending to show that the Belle of Nelson and Clan Alpine took the lead within a few jumps after leaving the wire, and that she could not have collided with Wolverton at the turn, as she had been ahead of him for quite a distance before they reached the turn.

The defendant has also given proof tending to show that plaintiff's horse was badly ridden; that his rider was incompetent and did not understand the proper management of his horse, and that the horse was out of condition; and that he stumbled in his exercises before the race, and was in such condition as to be liable to fall upon being pushed to his utmost in the second heat of a contest like this. You will see, therefore, that there is a conflict of testimony here which you must settle, as to whether this injury was occasioned by the fault of defendant's jockey.

It is for you to say which one of these witnesses you will believe, or where you will place credence—not that you must necessarily conclude that either of these witnesses has sworn falsely, because you must see from the manner in which these witnesses have testified that it was very difficult to see just exactly at the critical moment when this horse fell, what horse was next to him, or what horse caused him to fall, or what did actually cause him to fall. The whole matter seems to have occurred instantaneously, and witnesses of equal intelligence and equal credibility have given you

different versions of the way in which this accident occurred, and the manner in which the horse fell, and what horse was nearest to him. Some say the Belle of Nelson was ahead; some say she was clear ahead of him more than a length; and others say she was running with Wolverton's nose about at her saddle when her rider pulled her in ahead of him, and thereby tripped him up. These witnesses testify from various positions. You must determine from the intelligence of the witnesses, from their apparent candor and fairness, and from their opportunities of observation, where the truth lies in this case.

The plaintiff has the burden of proof. He is bound to satisfy you by a preponderance of testimony that the accident in this case was occasioned by the fault of the defendant's jockey. If you cannot say from the testimony in the case when it is all considered together, that it was the fault of this defendant's jockey, then the defendant is not liable.

The plaintiff is bound to satisfy you, not only that his horse fell, but that it was caused by this defendant's act, or the act of his jockey, and that it was a willful or intentional act on the part of the jockey, or so grossly negligent as to amount to incompetency on his part. If the proof does not satisfy you that this horse was killed by the act of the defendant's jockey, or by the gross incompetency and negligence of the defendant's jockey, or if you find from the proof that the death of plaintiff's horse was caused by his being out of condition, or his stumbling, or the negligence or incompetency of plaintiff's jockey, the defendant will be entitled to a verdict at your hands; but if you find from the proof, that the horse was killed, as charged, by the foul riding of the defendant's jockey, then it will be your duty to find a verdict for the plaintiff, and in case you do, it will also be your duty to fix the damages which the plaintiff has sustained by the

loss of his horse, and in doing so the damages must be estimated at what is shown by the proof to have been the value of the horse.

The proof tends to show that this was a thoroughbred horse, bred in England, and imported into this country only a few weeks prior to this race. The plaintiff alleges that the pedigree of his horse shows a high degree of excellence of blood, but the pedigree is not before you.

There is, however, testimony of not only the plaintiff himself but of experts who saw the horse, and who claim from experience to be able to judge whether a horse is or is not thoroughbred, that he was a thoroughbred horse. From the testimony in the case you are to say, if you find the defendant guilty, what is the value of the horse, because the measure of plaintiff's damages is the value of the horse, it being conceded that the loss was a total one.

Verdict for plaintiff.

DANIEL EVANS vs. WALTER FAXON *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY, 1882.

REMOVAL OF CAUSE—PARTIES TO CONTROVERSY.—Where a bill has been filed in a State Court attacking the validity of a trustee's sale under a deed of trust, and asking leave to redeem the property, the trustee is a necessary and not a formal party to the suit, and if the complainant and the trustee are residents of the same state, the mortgagee and the purchaser at the trustee's sale both citizens of a different state, cannot remove the suit to the Federal Court on the ground of citizenship.

George C. Fry, for plaintiff.

McConnell, Raymond & Rogers, for defendants.

DRUMMOND, J.—The facts in this case, as disclosed by the bill, are that the plaintiff, in 1873, being indebted to Walter Faxon, executed a deed of trust to Joel D. Harvey to secure the indebtedness, and by the terms of the deed of trust the trustee was authorized, upon the non-payment of any of the notes representing the indebtedness, to cause the real property named in the deed of trust to be sold, upon giving notice in the manner pointed out in the deed. The money becoming due and unpaid, the trustee in 1879, at the request of the creditor, gave notice of the sale of the property, and it was accordingly sold to Edwin Faxon for $2,400; and the bill alleges that the title stands on the record in his name. A bill was filed in the State Court on the 15th of September, 1881, by the plaintiff, to redeem the land, and to set aside the sale because of informalities, and a non-compliance with the conditions pre-

scribed in the deed of trust, on which alone the power to sell was to be exercised. On the 5th day of November, 1881, the trustee answered the bill, denying that there were any informalities, or that there was a non-compliance with the conditions prescribed in the deed of trust. The plaintiff and the trustee were and are citizens of Illinois. Edwin and Walter Faxon were and are citizens of Massachusetts. The two latter, on entering their appearance in the State Court, on the 16th day of December, 1881, made an application to remove the case to this court, and filed the proper petition and bond, alleging that the trustee was only a nominal party. A motion is now made to remand the case on the ground that the trustee is a necessary party, and, he being a citizen of the same state as the plaintiff, the case was not subject to removal.

If the trustee is only a nominal party the case could be removed under the 12th section of the act of 1789, because the plaintiff is a citizen of Illinois, and the Faxons are citizens of Massachusetts; but if the trustee is a necessary party to the litigation, then the cause could only be removed under the last clause of the second section of the act of 1875.

Under our law the trustee was clothed with the legal title to the land. The bill seeks to redeem the land, and so to revest the title in the grantor.

There are two questions in the case as made by the bill. The first is whether the trustee duly executed the power by the sale of the property. The second is whether the plaintiff has the right to redeem the land. As the bill attacks the sale made by the trustee and asks that it be set aside, and makes the trustee a defendant, it would seem as though that was a controversy to which the trustee was a party, and that he would necessarily have the right to defend his action, and to show that the power was duly executed. It is said that the trus-

tee being clothed with only the legal title, and having sold the land to Edwin Faxon, the title has passed to him by the sale, although the trustee may not have properly executed the power contained in the deed. And it is further insisted that Edwin Faxon stands in the place of the trustee; and as the rule is that whoever purchases land which a trustee sells under a power contained in a deed is bound to see that the trustee duly executes the power, therefore he is in the same position as the original trustee, clothed simply with a legal title. To a great extent, this is perhaps, true, because it is clear that if the power has not been duly executed, the purchaser has not acquired a good title to the land; but still it is also true that whether Harvey properly executed the power is a controversy in which he is interested, and which is involved in this suit. He sold the property to Edwin Faxon for $2,400. The necessary inference from the pleadings is that the money was paid to him by the purchaser, and if the sale is set aside because of a non-execution of the power by him as trustee, he would be responsible to the purchaser for the money received from him; and if this case should proceed to decree with Harvey as a party, and the court should find, and so decree that the power was not properly executed, that would bind Harvey in any proceeding which might be instituted on the part of the purchaser against him; so that although the bill does not ask for any special relief as against Harvey, still Harvey has necessarily to be a party to the decree which might be rendered in the case, and by which he would always be bound; and it would seem to follow that, because he would be bound by such a decree, he is not a mere nominal party to this litigation.

The language of the last clause of the 2d section of the act of 1875 is:

"And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of dif-

ferent states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the Circuit Court of the United States for the proper district."

Now, it can hardly be said that, in this case, under the allegations of the bill, and with Harvey as a defendant in the suit on answer filed in the State Court before it was sought to be removed, that there is in this case a controversy which is wholly between citizens of different states, and which can be fully determined as between them.

In the case of *Ribon vs. Railroad Company*, 16 Wall. 446, the railroad company had executed several deeds of trust upon its property, making various persons trustees. An arrangement was made by the railroad company with another railroad company by which a bill was filed by some of the trustees against other trustees and the grantor railroad company, to foreclose the deeds of trust, so that the other railroad company might become the purchaser of the property for a certain price and be reorganized. Some of the bondholders and stockholders of the company that executed these deeds of trust were not parties to and were dissatisfied with the agreement that had been made between the two companies, and filed a bill to set aside the decree in the foreclosure proceeding on the ground that it was collusive. The two railroad companies were made parties to this bill, but not any of the trustees or stockholders of the grantor railroad. The Supreme Court of the United States held that it was necessary that the trustees should be made parties, and affirmed a decree dismissing the bill because they were not. It was admitted that the foreclosure proceedings and decree and sale were regular and valid on their face, and as the trustees were all parties to the decree there would seem to be no doubt that the legal title passed to the purchaser under the

decree of foreclosure; but the ground upon which the Supreme Court held that the trustees were indispensable parties was that if the sale should be annulled they might be called upon and required to refund in the same manner as a plaintiff who collects a judgment which is afterwards reversed; and as the proceeds of the sale of the grantor railroad were to be divided among its bondholders and stockholders in a certain manner agreed upon between the parties, they might also be required to refund.

So in this case, as has already been stated, if this sale is set aside, Harvey, the trustee, may be required to refund the proceeds of the sale. I cannot dispose of this case as though the trustee were not a party to the litigation. He is a party; has answered the bill, defending the sale which he has made, and alleging that it was valid, and that there was a due execution of the power. The only ground upon which the bill of the plaintiff proceeds is that because the sale was invalid he has a right to redeem from the deed of trust. The two things are dependent upon each other, and necessarily connected together. *Blake vs. McKim*, 103 United States, 336. So that the jurisdiction of this court not being clear upon the facts as presented, it will be remanded to the State Court.

FRANK C. ALDRIDGE vs. ROBERT B. CROUCH *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—FEBRUARY, 1882

1. REMOVAL OF CAUSES—APT TIME.—Where it is attempted to remove a cause from a State Court to the Federal Court, it must affirmatively appear on the record or be shown by the petition, that the case could not have been heard or tried at a term of the State Court before the application for removal was made.

2. TERM AT WHICH CAUSE CAN BE REMOVED.—The construction of the statute is that, if at any term the case could be tried in conformity with the law and practice of the court, an application at a subsequent term will be too late.

3. WHEN STATE COURT DOES NOT REACH CASE AT FIRST TERM.—The fact that the court proceeding in its regular order did not reach the case, on account of pressure of business, at the first term at which it was ready for trial will not give the parties the right to make application for removal at a subsequent term.

4. STATUTE OF 1867—REMOVAL ON ACCOUNT OF PREJUDICE.—The statute of 1867 does not permit a citizen of a state in which a suit is brought, to make application for removal on account of prejudice.

A. C. Story, for plaintiff.

George W. Kretzinger, for defendant.

DRUMMOND, J.—The plaintiff is a citizen of South Carolina, and the defendants are citizens of Illinois. Crouch is the only party who has been served with process and appears in court. An action at law with the usual money counts was commenced in the Circuit Court of Cook county on the 15th day of March, 1881, and on the 25th day of April following, the defendant Crouch filed his plea. Under the law of this state there was a term of the Circuit Court for every month. The practice act of the state required that the clerk

should keep a docket of all cases pending for each term. There was to be a certain number of cases set for each day of the term, and the cases were to be tried and disposed of in the order in which they were placed on the docket, unless the court, for good and sufficient cause should otherwise direct. On the 20th day of October, 1881, Crouch filed his petition for the removal of the case to this court, and gave bond, under the act of Congress. When the transcript was filed in this court it was, on motion of the plaintiff, remanded to the State Court, for the reason that it did not appear from the record that the application for a removal was made in time, within the meaning of the act of Congress. After the cause was thus remanded to the State Court it was placed at the foot of the trial calendar, and on the 25th of January, 1882, there was another petition filed in the State Court for removal of the cause, and a bond given under the act of Congress, and the transcript has now been presented to this court, and the court is again called upon to determine whether the cause is properly removable.

There is no other objection except that the application was not in time, and we may at present consider the question as if the application were made only under the act of 1875, the third section of which declares that it must be made "before or at the term at which the cause could be first tried, and before the trial thereof." The only difference between the application now and when the cause was before this court on the former application, is that in the second petition which was filed in the State Court Crouch says that the cause could not previously have been tried or heard in the Circuit Court of Cook county. Why it could not have been heard or tried he does not state, and the question for the court to determine is whether, upon this statement, when connected with the other facts disclosed in the record, it can be presumed that the application was made in time under the act of Congress; and, I

think, it cannot be so presumed, and that the case is not essentially changed from the position which it occupied at the former hearing before this court. It is no further changed than by the above allegation upon the face of the petition, and the court cannot assume that constitutes a sufficient reason why the application was not made before. If we consider it—as perhaps we cannot—an application made on the 20th day of October, 1881, and not on the 25th day of January, 1882, I am of the same opinion that I was on the former occasion, that it does not affirmatively appear upon this record, or even by the petition, that the case could not have been heard and tried before the application was made on the 20th of October; and, of course, for a much stronger reason, before it was made on the 25th of January of this year. Suppose there is an issue made up in the case, and the cause is in a condition to be heard and tried but cannot be on account of pressure of business, if the return term has arrived, and the pleadings are filed according to the rules and practice of the court, it is not competent for a party to lie by and allow a term to elapse, and then make his application and say that he is in time. I take it that the true construction of the statute is that if the case is in a condition where it can be tried in conformity with the law and the practice of the court, then an application after that term in which it is in that condition, comes too late. Now, it may be that there was a pressure of business, so that the court could not very well try the case. But if that were so, and there were other cases having priority over it on the docket, in may still have been in a condition where it could have been tried and heard, within the meaning of the statute. The meaning of this statute is not that the court in its regular order, if it proceeded in that way, did not take up the case, but where the court could not take up the case and hear and try it, whatever might be the understanding as to other cases, or of the

counsel who were employed in other cases. That seems to be the meaning of the language of the statute, "before or at the first term at which the cause could be tried, and before the trial thereof." This was the construction put upon this clause of the statute in some of the cases which have been cited, and it was the construction by this court in *Kerting vs. American Oleograph Co.*, *ante*, 81, where one of the parties had a right to set the case down for hearing and did not. Now, in one sense, that case had not been set down for hearing; but the reason why it was not was because the counsel did not so choose. It was not competent for a party to decline to set the case down for hearing and then allow a term to pass and make an application subsequently for a removal of the cause.

The application made under the act of 1867, clearly is not within the statute. The application for removal was made by Crouch, one of the defendants, and the only defendant in court. He is a citizen of Illinois. The plaintiff, against whom this application is made, is a citizen of South Carolina, and the statute does not permit a citizen of a state in which the suit is brought to make an application to remove on account of prejudice, but only the citizen of another state, where the suit is between such citizen and the citizen of the state in which the suit is brought. This case will have to go back to the State Court, on the ground that the case has not in law been removed from the State Court.[1]

[1] *Bible Society vs. Grove*, 101 United States, 610; *Babbitt vs. Clark*, 103 United States, 606; *Gurnee vs. County of Brunswick*, 1 Hughes, 270; *Murray vs. Holden*, 1 McCrary, 341; *Forrest vs. Keeler*, 17 Blatchford, 522: *Kerting vs. American Oleograph Co.*, *ante*, 81.

CHARLES H. HAPGOOD *et al.* vs. HORACE L. HEWITT.

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1882.

IN EQUITY.

1. PATENTS—RIGHTS OF INVENTOR WHEN AN EMPLOYE.—A person is not deprived of his right to an invention made while in the service of another, unless he has been employed to exercise his inventive faculties for the benefit of that other.

2. EMPLOYER AND EMPLOYE—RIGHT TO PATENT ISSUED TO EMPLOYE—INVENTION.—A contract by which one person agrees to pay a sum of money for the time, labor and skill of another, gives the employer no right to an assignment of a patent which is issued to the employé for an invention made during the period of employment, although such employé was assisted and aided by advice and suggestions from his employer and from other employés, and although the employer paid for the materials used in getting up the invention.

This was a suit brought by Charles H. Hapgood, James H. Hesse, and John Parker, trustees of Hapgood & Co., a defunct corporation, organized under the laws of the state of Missouri, and the Hapgood Plow Company, a corporation organized under the laws of the state of Illinois, against Horace L. Hewitt.

The relief sought was a decree compelling the defendant to assign to the Hapgood Plow Company, as the successor of Hapgood & Co., or to the trustees of the last named company, in trust for the Hapgood Plow Company, certain letters patent which the defendant caused to be issued to him for improvements in iron sulky plows. The bill was demurred to for want of equity. It averred in substance:

That the defendant represented to the Hapgood Company, which was organized at St. Louis, under the laws of Missouri

to manufacture and sell plows and other implements, that he had had large experience in the manufacture and sale of plows, and devising and making improvements of the same; that if employed by the company he would devote his time and services to getting up and perfecting plows and other goods in its line of business; that relying upon the defendant's representations as to his skill in the manufacture of plows, and in devising improvements of the same, he was given employment by the company; that after being so employed the defendant become the owner of some of the company's stock, and was made its superintendent; that in consideration of a salary of $3,000 a year the defendant agreed to devote his time to the service of the company, and his skill in devising and making improvements in plows manufactured by it; that during his regular working hours, and with the aid of instructions, directions, and suggestions from the officers and the employés of the company, the defendant succeeded in getting up an improved iron sulky plow, the company paying for all the labor and materials which were used in its construction; that the company manufuctured plows after the model so gotten up by the defendant and other employés, and on the 26th of March, 1878, the defendant being no longer in the service of the company, a patent was issued to him, on his application, covering certain parts of the improved iron sulky plow, and the defendant now claims the exclusive ownership of such patent; that after the granting of the patent to the defendant, viz., on the 1st of January, 1880, the corporation of Hapgood & Co. was dissolved, and the trustees named were appointed under the laws of Missouri, to wind up its affairs; that on the 27th of December, 1879, a corporation was organized, under the laws of Illinois, under the name of the "Hapgood Plow Company;" that in getting up said plow, and the improvements which it embraced, the defendant did

no more than it was his duty to do under his employment, his employers, Hapgood & Co., in equity being the owners of the right to manufacture said plow, and of the right to a patent to anything that was patentable as an improvement of the same; and that the Hapgood Plow Company became the successor of the Hapgood Company, and owner of all its assets of every kind and description, including its equitable right to said letters patent.

John G. Williams and *E. W. Pattison*, for complainants.

Wood & Boyd and *Chapman & Hammond*, for defendant.

GRESHAM, J.—Persons are not deprived of their right to their inventions while in the services of others, unless they have been hired and paid to exercise their inventive faculties for their employers. A contract by which one person agrees to pay a sum of money for the time, labor, and skill of another, for a given period, gives the employer no right to an assignment of a patent that is issued to his employé for an invention made during the period of his employment. The defendant represented to Hapgood & Co. that he had had a large experience in the manufacture and sale of plows, and that he had a thorough knowledge of that business. It was the benefit of that knowledge and experience the defendant's employer desired, and for which it contracted. The defendant was not expressly required by his contract with Hapgood & Co. to exercise his inventive faculties for the benefit of the company, and there is nothing in the bill from which it can be fairly inferred that he was required or expected to do so. The bill avers that the defendant was aided and assisted by advice and suggestions from other officers and employés of the company in getting up the improved plow for which he obtained the patent. If the invention was the joint work

of the defendant and his co-employés he was not entitled to a patent as sole inventor. But, however this may have been, if Hapgood & Co. had any right to the invention by virtue of the terms of the defendant's contract of employment, it was a mere naked license to make and sell the patented improvement as a part of its business. This right, if it existed, being a mere personal one, was not transferable, and it was extinguished with the dissolution of the corporation. Curtis on Patents (4th Ed.) section 213; *Continental Windmill Co. vs. Empire Windmill Co.*, 4 Fisher's Pat. Cas. 428.

Demurrer sustained.

THOMAS B. ELLIS vs. BENJAMIN T. SISSON *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MARCH, 1882.

1. REMOVAL OF CAUSES—INCIDENTAL CONTROVERSY.—An incidental controversy which has arisen during the progress of long continued litigation in a State Court, but which did not exist at the time the suit was instituted there, does not entitle the parties thereto to remove the cause to the Federal Court on the ground of citizenship.

2. CONTROVERSY ARISING DURING LONG CONTINUED LITIGATION CANNOT BE REMOVED.—So where litigation had continued for twenty years in the State Court concerning the disposition of certain land, and parties then filed their petitions in the State Court, claiming that since the suit had commenced, they had made valuable improvements on the land for which they were entitled to a lien; it was *held*, that they could not remove the cause to the Federal Court.

George W. Spahr, for petitioners, Cable and Lee.

Charles Dunham and *Chas. M. Osborn*, for defendant.

Ellis vs. Sisson.

DRUMMOND, J.—This is a motion to remand this cause to the Circuit Court of Peoria county, from whence it came. It is a controversy of many years' standing, to which John W. Waugh, at one time the owner of 480 acres of land in Mercer county, Benjamin T. Sisson, who, with Waugh, had erected a steam flouring-mill thereon, Henry B. Ellis, and others were parties. The facts are very complicated, and many questions have arisen in the course of the litigation in which different parties and different interests have been involved. The object has been to dispose of the property in such a way as to have the proceeds divided for the benefit of various claimants; a principal controversy being, who had the prior claim and lien upon the property. There were bills for specific performance, for foreclosure of mortgages, various cross-bills, supplemental bills, amendments, answers, and replications. The litigation commenced as long ago as March, 1861, and the first case reported is that of *Sumner vs. Waugh*,, 56 Ill. 531. The decree rendered in that case in the lower court was reversed by the Supreme Court. The case then went back to the Circuit Court and came up again as the case of *Cable vs. Ellis*, and is reported in 86 Ill. 525. In both cases the facts relating to the controversy are stated with more or less fullness. The decree of the lower court was again reversed in *Cable vs. Ellis*, and on the case being sent back to the court below a decree was rendered which was again appealed through the Appellate Court to the Supreme Court of the state and is reported as *Ellis vs. Sisson*, 96 Ill. 105, where the decree of the Appellate Court was reversed, and the case was again returned through the Appellate Court to the Circuit Court of Peoria county. It will thus be seen that the litigation has continued through the various courts of this state for twenty years, during which time it has been before the Supreme Court of the state three times. It was after all this had taken place that

in May, 1881, Hiram Cable and Robert Lee for the first time appeared in the case and filed their respective petitions in the Circuit Court of Peoria county, claiming that since the litigation had commenced they had made valuable improvements on a part of the land, for which they were entitled to a lien, and asking that it should be recognized in the distribution of the proceeds in any sale that might be made of the property. On the 28th and 29th of July, 1881, Cable and Lee filed their respective petitions and bonds for the removal of the cause to this court, on the ground that there was a controversy between them and citizens of other states which could be fully determined as between them, and the question is whether they had a right under the act of 1875 to remove the cause to this court, and I think that they had not. It has been decided by the Supreme Court of the United States in *Barney vs. Latham*, 103 United States, 205, that when a cause is brought within the terms described in the second and third sections of the act of 1875 the whole suit is removed, and not a part; so that, if this case was properly removable, it brings with it the whole litigation connected with this controversy and the innumerable questions which have arisen during its progress. It will be observed from the statement which has already been made that this is a controversy which has sprung up many years after the litigation commenced, and not one which existed at the time that the suit was instituted, and it is, besides, an incident of the litigation; and I can hardly believe that it was the intention of Congress, when it declared that if in any suit mentioned in the last clause of the second section of the act of 1875 there should be a "controversy which is wholly between citizens of different states and which can be fully determined as between them," it meant an incidental controversy of this kind which might arise during the progress of the cause, and where parties might come in for the

protection of their interests. If this be the true construction of the act of 1875, then it is easy to see that there will be no end to instances where, during a protracted litigation in which property may be in charge and subject to the jurisdiction of the State Court, an application can be made, where the citizenship of the parties may authorize it, for the removal of the suit to the Federal Court. The question is very important, because there are many cases where the State Courts take possession of property and administer it, dispose of it, and distribute the proceeds among the parties entitled to it; and to hold, after a State Court has for a series of years thus proceeded to ascertain and settle the rights of parties litigant and their claims to property, that where a person has an incidental interest, therefore he can remove the suit to the Federal Court, might complicate in a very serious manner the relations which exist between the State and Federal courts, and interrupt the harmony which ought to exist between them in adjudicating the rights of parties.

The motion to remand will therefore be granted.

This case is now pending in the Supreme Court. [*Reporter.*

GARRETT P. ATCHISON vs. D. G. MORRIS.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MARCH, 1882.

1. NON-RESIDENT WITNESS PRIVILEGED FROM SUMMONS DURING ATTENDANCE.—While a resident of one state is attending the Federal Court in another state as a witness, in obedience to a subpœna, he is privileged from service of summons in a civil action.

2. SAME.—The fact that there was no effort to influence the witness to come into the state with the view of having the summons served upon him, does not affect his privilege.

3. SERVICE OF SUMMONS MAY BE SET ASIDE IN FEDERAL COURT AFTER REMOVAL FROM STATE COURT.—And if such witness is served with a summons from a State Court, the filing in that court of a petition and bond for removal to the Federal Court, is not such an appearance as will prevent him from objecting to the service when the case is removed to the Federal Court.

Quigg & Tuthill, for complainant.

Doolittle & McKey, for defendant.

DRUMMOND, J.—The defendant, a resident of the town of Sharon, Walworth county, Wisconsin, on the 7th day of February last was subpœnaed, under section 876 of the Revised Statutes of the United States, as a witness in this court on a trial of a cause then pending. In obedience to the subpœna he attended court, and while in Chicago, on the 9th day of February, was served with a writ of summons in this case, issued out of the Superior Court of Cook county, in this state. The parties in this suit, and in the suit formerly pending in this court, were all different. This cause has been duly removed from the Superior Court to this court under the act of Congress, and an application is now made

to set aside the service. It is founded upon an affidavit, from which, and from the admissions of the parties, it appears that the defendant presented himself in court to testify as a witness on the subpœna served upon him; and that while in Chicago, thus in attendance on the court, and before the trial of the case, the summons in this case out of the Superior Court was served upon him. If the privilege of a witness operated at all upon the defendant, it would protect him so as to give him a reasonable time after the disposition of the cause to go home. It is not claimed in this case that there was any effort to influence the witness to come to Chicago with a view of having the summons served upon him; and the general question in the case may be considered to be this: Whether a person who attends a court in this state as a witness, being a resident of another state, is, while thus in attendance as a witness, subject to the service of process of summons in a civil action? All admit that he is not subject to arrest while thus in attendance as a witness, or while coming or going. The only difficulty is whether he can be served with process of summons; and I have come to the conclusion that he cannot.

It is not necessary to go through all the cases upon the subject but a few of them may be referred to. In some of the states it has been decided that the privilege of a witness is limited to the case of freedom from arrest. *Catlett vs. Morton*, 4 Littell, 122; *Legrand vs. Bedinger*, 4 T. B. Monroe, 539; *Sadler vs. Ray*, 5 Rich. 523; *Hunter vs. Cleveland*, 1 Brevard, 167; *Page vs. Randall*, 6 Cal. 32.

In New York and Pennsylvania it is held that the privilege extends, in such a case as this, to freedom from the service of civil process on the witness. *Norris vs. Beach*, 2 Johns. 294; *Hayes vs. Shields*, 2 Yeates, 222; *Person vs. Grier*, 66 N. Y. 124; *Seaver vs. Robinson*, 3 Duer, 622; *Coburn*

vs. Hopkins, 1 Wend. 292; *Taft vs. Hoppin*, Anthon's Nisi Prius Rep. 255; *Sanford vs. Chase*, 3 Cow. 381.

In *Coburn vs. Hopkins*, the court refers to a distinction between the case of a witness resident in the state and one who is a non-resident witness, and attends in the courts of New York. See *Parker vs. Hotchkiss*, 1 Wall. Jr. 269, for other cases decided in Pennsylvania.

In the Federal Courts the weight of authority seems to be in favor of the more liberal view of the subject. In *Lyell vs. Goodwin*,, 4 McLean, 29, the question is not presented entirely free from every other consideration, because in that case the service was made while the person (a judge of the Supreme Court of the state) was actually engaged in the performance of his judicial duties; and therefore it might be said that he was in the same condition as a witness in actual attendance in court. If a judge were on the bench and transacting business in court, it would not, I presume be claimed that he could be then served even with a summons; but the reasoning of the court in *Lyell vs. Goodwin*, is in accordance with the rulings of the cases in Pennsylvania and New York. In the case of *Lyell vs Goodwin*, 4 McLean, 44, another case with the same parties, Judge McLean apparently did not follow all the reasoning of the district judge of the court in the other case; and he held that the service on the defendant in that case, while not actually engaged in the performance of his judicial duties, though about to depart for that purpose, was good.

In *Blight vs. Fisher*, Pet. C. C. 41, Mr. Justice Washington held that the privilege of a suitor or witness extended only to exemption from arrest. In *Parker vs. Hotchkiss*, already cited, the case of *Blight vs. Fisher* is overruled by Judge Kane, and, as he says, with the concurrence of Mr. Justice Grier and Chief Justice Taney, of the Supreme Court of the United States. That was a case where the suit in which the

person claimed exemption had been dismissed and a summons was issued on the same day, and served on him at his lodgings; and, as already stated, the cases in Pennsylvania are cited and approved.

In *Juneau Bank vs. McSpedan*, 5 Biss. 64, the court decided that where a non-resident defendant came within the state as a party for the purpose of defending his suit, that he could not be served with process in another suit, although the prior suit had first been dismissed; that is to say, he was entitled to his privilege as a party coming, remaining, and going. The court, in *Brooks vs. Farwell*, 2 McCrary, 220, decides the question in the same way.

In *Wilder vs. Welsh*, 1 MacArthur, 566, the court held that the privilege of a witness in attendance upon a congressional committee was no higher than that of a member of Congress, and that he might be served with summons as a defendant in a suit commenced in that court. A member of Congress is, by the express language of the Constitution, free from arrest during his attendance upon Congress, except in certain criminal cases, but it would seem if a witness in court is entitled to freedom from the service of summons, a witness before a committee of Congress ought also to be exempt. He can no more disobey a subpœna or order of the committee than a witness can disobey a subpœna issued from a court. And see *Bridges vs. Sheldon*, 7 Fed. Rep. 43.

In *Scudder vs. Union Nat. Bank*, 91 U. S. 406, the question was somewhat discussed. The facts in that case were that Scudder, who was a member of a firm in St. Louis, was sued in Missouri by the Union National Bank of Chicago. While that suit was pending, and testimony being taken in Chicago, Scudder came to Chicago to be present during the taking of the testimony, and while in Chicago he was served with process of summons out of this court by

the same plaintiff for the same cause of action; and thereupon the suit in Missouri was dismissed, and the question arose whether the process of summons under those circumstances could be served upon Scudder. It was objected that Scudder was enticed to come into this district in order that he might be served with process, and the suit might be litigated here instead of in St. Louis. There was also a question in the case whether it was necessary for him to be present during the taking of testimony. All that the Supreme Court in its opinion states upon the subject is this: "It is not necessary to examine the question whether a denial of the motion to set aside the summons can be presented as a ground of error on this hearing. The facts are so clearly against the motion that the question does not arise." It does not appear what reasons influenced the court to make this statement; whether the principal question in this case was distinctly considered in that, or whether the presence of Scudder was considered unnecessary in the taking of the deposition, or whether he was in a condition to claim the privilege of a party or witness while attending court. See *Plimpton vs. Winslow*, 9 Fed. Rep. 365; *Matthews vs. Puffer*, 10 Fed. Rep. 606.

It may be said that thus to extend the privilege of a witness is going very far to protect persons in their attendance on the courts. The answer to this, by the courts which have decided in favor of the privilege, is that a witness who is required to attend a court, especially from another state, should feel he is not subject either to arrest or to the prosecution of a civil suit. He may be debtor to various parties in the jurisdiction where he is required to attend; and, if he is, he may fear suits, and that may prevent him from attending to testify in a cause; and it is because testimony given by a witness in open court is considered so much more valuable than any other kind of testimony by a

witness that the courts have been so liberal in extending his privilege.

Another question made in this case which it is necessary to decide, grows out of the fact that the defendant, when he was served with summons, went into the State Court and moved, upon petition filed and bond given under the act of Congress, that the cause should be removed from the State to the Federal court. It is claimed that this was an appearance which admitted the sufficiency of the service upon him, and that it is not competent for him, after those proceedings, to come into this court and move to set aside the service. There was, in fact, no appearance entered in the State Court, unless the filing of a petition and the giving a bond constituted an appearance; but in any event, I think it was not such an appearance as to deprive the defendant of the right to make objection in this court to the service of summons. In fact, it may have been, among other reasons, for the very purpose of objecting to the service of summons that the defendant requested that the cause should be removed to the Federal Court, because in a proper case a party has a right to the opinion of the Federal Court on every question that may arise in the case, not only in relation to the pleadings and merits, but to the service of process; and it would be contrary to the manifest intent of the act of Congress to hold that a party who has a right to remove a cause is foreclosed as to any question which the Federal Court can be called upon under the law to decide; and I have no doubt this is such a question. Whether, if the defendant had made a formal appearance, independent of the application for removal, he could have objected to the service of process, is a question it is not necessary to decide here.

For the reasons already given the service of the summons in this case must be set aside.

THE STATE OF INDIANA vs. LEMUEL MILK *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—APRIL, 1882.

1. GRANT BY STATE—CONSTRUCTION.—In ascertaining the real meaning of the parties, a more liberal rule of construction is allowable in interpreting a grant from one state or political community to another, than is permitted in interpreting a mere private contract.

2. CONVEYANCES UNDER SWAMP LAND ACT—TITLE TO BED OF UNSURVEYED LAKE.—The Federal Government ceded to the state of Indiana under the Swamp Land Act of 1850, all the lots on Government subdivisions surrounding Beaver Lake, in that state, the lake being non-navigable and having never been surveyed, nor the bed offered for sale. The state having assumed the duty and obligation of draining the lands acquired by the grant, by the acceptance thereof, *held*, that the conveyance of all the lands surrounding the lake passed the title to the bed of the lake from the Government to the state.

3. CONVEYANCE BY THE STATE TO CITIZEN—TITLE TO NON-NAVIGABLE LAKE—RIPARIAN RIGHTS.—But when the state conveyed to private parties the tracts surrounding the lake, the title to the bed of the lake did not pass from the state to the grantees as riparian proprietors.

4. TITLE TO BED OF LAKES AND PONDS.—Mere proprietorship of the surrounding lands will not, in all cases, give ownership to the beds of natural non-navigable lakes and ponds, regardless of their size. Each case depends largely upon its own facts.

5. GRANT OF LAND ON LAKE EXTENDS ONLY TO EDGE.—While a general grant of land on a non-navigable river or stream extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake, extends only to the water's edge.

6. CONVEYANCE BY STATE—TITLE—ESTOPPEL.—Where the state conveyed all the land surrounding a lake to private parties, making no express reservation of the bed of the lake, and the grantees, claiming title to the bed, laid out large sums of money in draining the lake, and subdivided and platted the bed, and subsequently the state derived title to a portion of the lots of such subdivision from such grantees, through *mesne* conveyances, and sold them out describing them according to the subdivision and plat, and levied taxes upon all the lots of the subdivision, *held*, that the state was estopped to set up title to lots derived by the defendants through the original grantees, although the state had never actually conveyed the title to the land embraced in such lots.

7. A STATE MAY BE ESTOPPED.—Resolute good faith should characterize the conduct of a state in its dealings with individuals; and there is no reason in morals or law which will exempt it from the doctrine of estoppel.

This was an action by the state of Indiana to recover possession of 2,868 acres of land, once part of the bed of Beaver Lake, in Newton county, in that state.

The defendants pleaded specially the facts upon which they claim title to the premises in dispute.

All the lands surrounding the lake were surveyed by the United States in 1835, but the lake was never surveyed nor the bed offered for sale. A meander line was run by the surveyors around the lake, which line and the lake are represented on the Government surveys and plats. All the lots on Government subdivisions surrounding the lake were ceded to the state by what is known as the Swamp Land Act of 1850, and patents were subsequently issued by the United States to the state for these lands, by their designations on the original maps and surveys. The General Assembly of Indiana passed an act, approved March 9, 1852, to regulate the sale of the swamp lands donated by the United States to the state, and to provide for draining and reclaiming the same, as required by the conditions of the grant. The lake at the time of the grant by the United States, and long prior thereto, was a shallow, non-navigable fresh water pond, containing fourteen thousand acres of land, with no outlet, forty feet above the Kankakee River, and between four and five miles from it.

After the passage of the last named act, and in pursuance of it, the state, by its proper officer, surveyed and located a ditch from the lake to the river, for the purpose of draining the lake and the lands surrounding it; and, after the location of this ditch, and before its construction, the state sold and patented to John P. Dunn part of the lots or tracts abutting on the lake, and to John P. Dunn and A. B. Condit jointly, the

remainder of all such lots. All these lots Dunn and Condit, and their wives, afterward conveyed in fee by proper deeds to Michael J. Bright, who, on the 5th of April, 1857, made and acknowledged a map or plat of the surrounding lots or tracts of land, and of the bed of the lake, whereby he subdivided the bed and the surrounding tracts into forty-acre lots, numbering them consecutively from 1 to 427. These lots were formed by extending the right lines east and west and north and south from the outward lines of the Government surveys, such extensions being made just as the Government would have made them but for the obstruction of the waters of the lake, and by dividing these lines so extended by right lines drawn from points equi-distant from corners formed by due intersection. Bright recited in this plat, that he had acquired title in fee to all the abutting tracts from Dunn and Condit, and as riparian proprietor was entitled to, and was the owner in fee of, the entire bed of the lake; that the lake had already been partially drained, and in time the bed would be reclaimed and fit for cultivation, and that he reserved for himself and his grantees the right to maintain the ditches and drains, and if necessary, to extend and otherwise enlarge them. After this plat had been duly recorded in the county in which the lake was situated, Bright and his wife, on the 19th of November, 1860, by their deed of that date, conveyed in fee to Aquilla Jones, one hundred and ninety-seven of the forty-acre lots, by their designated odd numbers on the plat, these lots containing in the aggregate 8,880 acres; and one month later, Jones and his wife, by their deed, conveyed in fee the same lots to the state, describing them by their designated odd numbers on the plat. These deeds were both properly recorded. An act was passed by the General Assembly of Indiana on the 12th of December, 1865, and approved the same day, "to provide for the sale of certain lands belonging to the state of Indiana, in the counties of Jasper and Newton, and

to give protection to actual settlers thereon." Section 1 of this act reads as follows: "That the lands belonging to the state of Indiana, in the counties of Jasper and Newton, acquired by conveyance from Michael G. Bright, dated November 19, 1860, and of Aquilla Jones, December 31, 1860, shall be offered for sale at public auction, by the auditor and treasurer of the county in which said lands may be situated, at the door of the court house in said counties, on a day to be fixed by said auditor and treasurer, not sooner than six, nor later than eight months after the passage of this act."

After the sale to Dunn and Condit, and before their sale to Bright, the state constructed the ditch previously located, from the margin of the lake to the river, wide enough and barely deep enough to afford a current from the lake to the river, and the action of the water deepened the ditch until the lake was so far drained, as to render two thousand acres of the bed fit for pasture lands, at the time Bright made and acknowledged his plat.

After the passage of the last named act, and before the 11th of January, 1873, the state sold and conveyed to divers persons for sums amounting in the aggregate to more than ten thousand dollars, the lands conveyed by Bright to Jones, and by the latter to the state; such conveyances all being of designated odd numbers on Bright's plat and by reference to it; and during the same period, Bright and his wife sold and conveyed to divers persons, the remaining even numbered lots, describing them in like manner, by reference to his plat; the state and Bright both selling the riparian title to the lots in the bed of the lake.

On the last named date, January 11, 1873, by an act of Congress approved on that day, the United States ceded to the state, the bed of Beaver Lake, and the state now claims title to the lands in suit under that act. While the state was constructing the main ditch from the bed to the river, Dunn and Condit

were engaged in constructing lateral ditches into and through the bed of the lake. This work was continued by Dunn and Condit until they sold to Bright; and he and his grantees of even numbered lots, and the state's grantees of odd numbered lots prosecuted the work of drainage, extending the main ditch three miles out into the lake, and the lateral ditches until they aggregated in length more than thirty miles. This was done at the expense of Dunn and Condit, and Bright and his grantees, and the state's grantees, and it involved an outlay five times greater than the outlay of the state in constructing the main ditch from the margin of the lake to the river.

Since the year 1860, and up to the present time, Bright and his grantees of even numbered lots, and the state's grantees of odd numbered lots, have been required to pay state and county taxes upon the lots in the bed of the lake, held by them as aforesaid, amounting to thousands of dollars.

Before the commencement of this suit, the defendant, Lemuel Milk, acquired title to the lots in dispute, by deed in fee from Bright and wife, and conveyed the same title through a trustee to his wife, and co-defendant, Jane A. Milk. The ditching done by Dunn and Condit, and Bright and his grantees, and the state's grantees, before the cession of the United States, in 1873, so far drained the lake that four thousand acres of the bed became fit for cultivation, and the residue, except six hundred acres, became fit for pasture lands.

At the same time that Lemuel Milk made his purchase of the even numbered lots in dispute, he bought a like number of odd numbered lots in the bed of the lake, from the state, some of the latter lots adjoining some of the even numbered lots so purchased from Bright.

Demurrer to the special answer.

D. P. Baldwin, Attorney General, and *Julian & Julian*, for plaintiff.

Baker, Hord & Hendricks, for defendants.

GRESHAM, J.—The first question raised by the demurrer to the special answer is: Did the state acquire title to the bed of Beaver Lake, by virtue of the Swamp Land Act of 1850?

It is asserted by the state, that as this was a natural non-navigable and unsurveyed lake, no title to its bed passed to the state by virtue of the cession of 1850, and that the title remained in the United States, until it was conveyed to the state by the Congressional act of January 13, 1873.

It is contended on the other hand, for the defendants, that the common law which limits the owner of land bordering on a natural, non-navigable lake or fresh water pond to the outer margin, is administered by the Federal Courts only as a part of the law of the state where it has been adopted, and that the interpretation of the swamp land grant is a Federal question, to be decided by the Federal statutes and rulings, if any there be.

Section 9 of an act of Congress, passed May 18, 1796, relating to the Northwest territory, reads thus: "That all navigable rivers within the territory to be disposed of by virtue of this act, shall be deemed to be and remain public highways; and that in all cases where the opposite banks of any stream, not navigable, shall belong to different persons, the stream and the bed thereof shall become common to both."

The spirit and reason of this statute, it is urged, apply with equal force to ponds and non-navigable lakes of the size and character of Beaver Lake, and if this is not true, that the statute furnishes an analogy for a rule which may be fairly deduced, applicable to this case.

In *Railway Company vs. Schurmeir*, 7 Wallace, 273, this section was interpreted to mean, that instead of the owners of opposite banks of a non-navigable stream being tenants in common of the bed, each held in severalty to the center of the stream.

The liberty that was exercised in this case of construing the statute according to its spirit and purpose, rather than by its words, would, it is contended, authorize an interpretation of the words, "a stream not navigable," as intended to include lakes not navigable.

No right was reserved by the act of 1796, to the beds of non-navigable streams, because the public had no interest in such streams, and it was not the policy of the Government to be a land owner in the states. But whether or not section 9 of this act was intended to embrace ponds and non-navigable lakes, as well as non-navigable streams, I think the state acquired title to the bed of Beaver Lake by virtue of the swamp land grant of 1850. Section 1 of that act provided, that to enable the state of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, rendered unfit thereby for cultivation, the whole of such lands remaining unsold at the passage of the act should be granted to the state. Section 2 made it the duty of the Secretary of the Interior to make an accurate list and plats of such lands, and transmit the same to the Governor of Arkansas, and at the request of the Governor to cause a patent to be issued to the state therefor, and on that patent, the fee simple to such land should vest in the state, subject to the disposal of its Legislature, provided, however, that the proceeds of such lands, whether from sale or direct appropriation in kind, should be applied exclusively as far as necessary to reclaiming such lands, by leveeing and draining the same. Section 3 provided, that in making out a list and plats, all legal subdivisions, the greater part of which were

wet and unfit for cultivation, should be included in such lists or plats; but when the greater part of a subdivision was not of that character, the whole of it should be excluded therefrom. Section 4 extended the act and its benefits to each of the other states in the Union in which swamp and overflowed lands, unfit for cultivation, were situated.

This grant was accepted by the state of Indiana, and all the lands surrounding Beaver Lake, were embraced by their numbers in the patent that was issued to the state for these and other lands. There were at this time in many of the states, swamp and overflowed public lands, which were of no value to the Government for any purpose, present or prospective, unless drained.

It has never been the policy of the Government to reclaim such lands with a view to their sale. They were unfit for cultivation, and useless for habitation. The drainage of these sections would promote settlement by rendering them more healthful, and no system of drainage could be successful that did not embrace the lakes and ponds. Here then, was a grant by the Government of the United States to a number of the states, of lands of designated classes to secure objects of public interest. In interpreting such a grant, no rigid rules of construction should be allowed to defeat the plain object and purpose of the parties.

By accepting the grant, the state assumed the duty and obligations of draining the lands acquired by it, including Beaver Lake.

The state could not properly drain the lands surrounding this lake, without draining the lake into the Kankakee River; and yet it is urged for the plaintiff, that the Government retained its proprietary interest in the bed of the lake and required the state to drain it at its own expense.

It is not probable, that in passing the Swamp Land Act, Congress was influenced by such small considerations of

thrift. In ascertaining the real meaning of the parties, a more liberal rule of construction is allowable in interpreting a grant from one state or political community to another, than is permitted in interpreting a mere private grant. A grant by a Government to a private individual of land upon a navigable river, is limited to the shore, while such a grant to a political community extends to the middle of the stream.[1]

Section 2 of the Swamp Land Act provided, that if the greater portion of any subdivision was wet or overflowed lands the whole subdivision should be embraced in the grant, and it was left to official discretion what, if any of the subdivisions surrounding a lake, were within the grant, but there was no doubt as to the character of the bed of Beaver Lake; it was overflowed land, and as such, the title to it was vested in the state. This lake was indicated upon the Government surveys and maps, and nothing remained to show that its bed was overflowed land within the meaning of the act.

The state then having acquired title to the bed of the lake, under the swamp land grant, we pass to the question: Did Dunn and Condit, by virtue of their purchase of the surrounding tracts, acquire title to the bed as riparian proprietors?

Non-navigable streams are usually narrow, and the lines of riparian owners can be extended into them at right angles, without interference or confusion, and without serious injustice to any one.

It was therefore, natural, when such streams were called for as boundaries, to hold that the real line between opposite shore owners was the thread of the current. The rights of the riparian proprietors in the bed of the stream, and in the stream itself, were thus clearly defined. But when

[1] *Haight vs. City of Keokuk*, 4 Iowa, 199; *Barney vs. Keokuk*, 4 Otto, 324.

this rule is attempted to be applied to lakes and ponds practical difficulties are encountered. They have no current, and, being more or less circular, it would hardly be possible to run the boundary lines beyond the water's edge, so as to define the rights of shore owners in the beds. Beaver Lake is seven and a half miles east and west, and less than five miles north and south. Extending the side and end lines into the lake, there being no current, when would they meet? This rule is applicable, if at all, whether there be one or more riparian proprietors. I do not think the mere proprietorship of the surrounding lands will, in all cases, give ownership to the beds of natural non-navigable lakes and ponds, regardless of their size. It would be unfair and unjust to allow a party to claim and hold against his grantor the bed of a lake containing thousands of acres, solely on the ground that he had bought and paid for the small surrounding fractional tracts—the mere rim.

A person might by purchasing the lands surrounding a small lake, in view of its size and other circumstances, be held to own the bed. Each case depends largely on its own facts.[1]

That while a general grant of land on a river or stream, non-navigable, extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake, extends only to the water's edge; see, *Wheeler vs. Spinola*, 54 New York, 377; *Canal Commissioners vs. The People*, 5 Wendell, 423; *Dillingham vs. Smith*, 30 Maine, 370; *Mansur vs. Blake*, 62 Maine, 38; *Paine vs. Woods*, 108 Massachusetts, 160; *The State vs. Gilmanton*, 9 New Hampshire, 461; *Mariner vs. Schulte*, 13 Wisconsin, 692; *Delaplaine vs. C. & N. W. Ry. Co.*, 42 Wisconsin, 214; *Boorman vs. Sunnuchs*, 42 Wisconsin, 233; *Seaman vs. Smith*,

[1] *Forsythe vs Smale*, 7 Bissell, 201.

24 Illinois, 521; *Austin vs. The Rutland Railroad Co.*, 45 Vermont, 215.

By their purchase of the abutting tracts, Dunn and Condit acquired title to the water's edge and no farther.

Is the state precluded by anything which has occurred since the purchase, from asserting title to the land in dispute?

Dunn and Condit were constructing lateral ditches at their own expense, extending out into the bed of the lake, at the same time that the state was constructing the main ditch from the lake to the Kankakee river, and they continued this work until their sale to Bright. It thus appears, that at the very start, the state's grantees of the Government subdivisions surrounding the lake, asserted title as riparian proprietors to the entire bed. Bright steadily asserted the same right as the grantee of Dunn, and of Dunn and Condit, and continued the work of ditching and draining the lake at his own expense. He asserted the same right in his recorded plat. His conveyance of alternate lots in the bed of the lake to the state, through Jones, by their designated odd numbers on his plat, was a no less unequivocal assertion of the same right. With knowledge of the claim that had thus been asserted by Bright and his grantors, and that they and Bright had been carrying forward in the bed of the lake a system of drainage at their own expense, the state purchased Bright's title to the odd numbered lots, by their designation on his plat; and from that time forward, the state has levied and collected taxes on the even numbered lots, and on the odd numbered lots after their sale by the state to others. The state had its election of insisting on its claim to the entire bed of the lake, or of accepting Bright's title to part of it. It saw fit to do the latter, with full knowledge of all the facts; and it is bound by its election, especially in favor of innocent

third parties whose rights have intervened, whatever may have been its rights in the first instance.

The state's purchase of Bright's title to part of the lots in the bed of the lake, was an admission of the validity of that title, and a settlement of any disagreement that had arisen between the state and Bright, growing out of the latter's assertion of that title. It was competent for the state and Bright to settle any question of disputed boundary between them, in their own way; and having done that, the state is concluded in favor of parties who subsequently purchased from Bright on the faith of that settlement.

That the state understood its acceptance of Bright's title to the odd numbered lots, operated as an establishment of the latter's boundaries in the bed of the lake, is shown by the subsequent levy and collection of taxes on the remaining portion of the bed, as well as by the passage of the act of 1865. The passage of this act was a solemn admission that the state's grants of the abutting tracts, entitled her grantees to the bed of the lake as riparian proprietors, and had the effect of confirming Bright's title to so much of the bed as he had not conveyed to the state.

Purchasers at public sale of lots acquired from Bright, had a right to suppose, and they no doubt did suppose, that the state had acquiesced in, and confirmed Bright's title to the bed of the lake.

If the state could convey title to the odd numbered lots as Bright's grantee, the latter could certainly convey title to the even numbered lots. The defendants bought fifty-four odd numbered lots from the state, and at the same time bought a like number of even numbered lots from Bright. Both sold the same title, and it is fair to assume that the defendants would have bought from neither, if the state had then asserted the same right that it asserts in this suit. The state occupies an attitude in this litigation not at all consist-

ent with its purchase of the Bright title, the passage of the act of 1865, the subsequent sale of all the lots acquired from Bright, and the levy and collection of taxes since 1860 on all the even numbered lots, as well as the odd numbered lots from the time the latter were purchased from the state.

Having induced the defendants, by repeatedly recognizing the validity of the Bright title, and by finally confirming it by the act of 1865, to alter their position by investing their money in that title, the state cannot now in fairness or law assert its invalidity.

Resolute good faith should characterize the conduct of states in their dealings with individuals, and there is no reason in morals or law that will exempt them from the doctrine of estoppel.[1]

Demurrer to special answer overruled.

[1] *Commonwealth vs. André*, 3 Pick, 224; *Commonwealth vs. Pejepscu Proprietors*, 10 Massachusetts, 155; *People vs. Society, etc.*, 2 Paine, 545; *State vs. Bailey*, 19 Indiana, 452; *People vs. Maynard*, 15 Michigan, 463; *Cahn vs. Barnes*, 7 Sawyer, 48.

EDWIN G. HAZELTON *et al.* vs. THE MANHATTAN FIRE INSURANCE COMPANY.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS.—APRIL, 1882.

1. MARINE INSURANCE—JETTISON OF DECK LOAD—GENERAL AVERAGE—USAGE OF TRADE.—An underwriter of a hull of a vessel is liable to contribute to general average for jettison of the deck load, when the custom or usage of the trade in which the vessel is employed, is to carry part of her cargo on deck.

2. CUSTOM OF INSURER TO CONTRIBUTE NOT ESSENTIAL.—And it is not necessary to show that there is a custom among the underwriters to contribute by general average for a cargo so carried. They must conform to the custom of the trade in which a vessel engages.

3. ADJUSTMENT OF LOSSES—CONSTRUCTION OF POLICY—LIABILITY OF INSURER.—A clause in a policy of marine insurance providing that all matters of adjustment and settlement of losses shall be subject to the rules and regulations of the ports of New York, refers only to the manner of making the adjustment when a liability is admitted, and cannot decide the question of the existence of any liability by the usage of such ports, when the insurance is made elsewhere

4. The rules and regulations of the "ports of New York" do not refer simply to the port of New York City, but to all the ports of that state.

5. REFUSAL OF INSURER TO ACT—RIGHTS OF ASSURED.—If the underwriter has the right to name the adjuster to make a general average adjustment his refusal to do so will not affect the rights of the assured.

This was a libel by the owners of the schooner Melvina against the respondent as underwriter on the hull of the schooner, for a general average claim by reason of the jettison of a quantity of pig iron from the deck of the schooner.

Schuyler & Kremer, for libellants.

Rae & Smith, for respondent.

BLODGETT, J.—The material facts as they appear in the record, are that on the 8th of November, 1880, the schooner Melvina took on board at Elk Rapids, Michigan, a cargo of pig iron for the port of Chicago, about 406 tons of which were stowed under deck, and about 61 tons, with the consent and knowledge of the shipper, were stowed on deck. The schooner was in all respects seaworthy and properly manned when she commenced her voyage from Elk Rapids for Chicago. The weather was stormy and cold, and she was compelled to take refuge for several days in the harbor of Ludington, and while there snow and sleet fell almost continually. On the 23d of November, she left Ludington in a seaworthy condition and properly manned, in prosecution of her voyage to Chicago. During the night of the 23d it became very cold, and a severe wind and snow storm set in, and the vessel became loaded with ice. The tiers of iron along the deck were drifted full of snow and ice so that the water which came on board could not run off through the scuppers, and the vessel was in danger of foundering; and to save the lives of her crew, the vessel and her cargo below deck, her deck load was jettisoned. Thus relieved, the schooner rode out the storm in safety, and made her port of destination with the remainder of her cargo, where due protest and notice for general average were made.

The Manhattan Insurance Co., respondent in this case, had issued a policy upon the hull, tackle, apparel and furniture of the schooner, for the sum of $3,000, insuring the schooner against the perils of navigation, jettison, etc., which policy was then in force; and the amount charged against this policy by the adjuster in making the general average was $293.39, which the respondent, after due notice and demand, refused to pay.

The proof also shows, without contradiction, that it is usual and customary for vessels engaged in carrying pig iron

on these lakes to stow a portion of the cargo on deck, for the reason, as stated by the witnesses, that it "makes the vessel work easier in the sea, and without straining;" the proof tending to show that when the entire cargo consists of iron, about 15 per cent. is loaded on deck. The proof also shows, and without contradiction, that the iron in question was properly stowed upon the deck, being piled in tiers next the bulwarks.

The respondent denies its liability.

First—Because the peril which made the jettison necessary was occasioned by the choking of the scuppers by snow and ice which gathered on and among the iron by reason of its improper stowage.

Second—Because the insurer of the hull is not liable to general average for a jettison of the deck load.

Third—Because the policy provides that in case of loss the adjustment shall be made according to the usage and rules of the ports of New York, and by an experienced adjuster to be selected by the underwriter; and it is admitted in this case that by the usage of underwriters of the port of New York the loss of a deck load would not be adjusted as a general average loss.

As to the first of these points, it is sufficient to say that the libellants' proof shows that the cargo put on deck was properly stowed on deck, and the respondent has offered no proof to show that it could have been stowed in any better or safer manner there. The validity of this objection, it seems to me, must depend on whether the iron was rightfully stowed on deck at all. If it was rightfully there, the proof seems to show that it was properly placed, that is, it is not shown to have been in a wrong or improper place on deck. The proof does not show that it was alone the clogging of the scuppers by snow and ice among the iron that weighted the vessel down, so that she would not rise to the

sea and was in danger of foundering, but her whole rigging and hull were loaded and loading with ice and snow as well as her deck. It is likely that the closing of the scuppers increased the accumulation of ice; but I conclude from the proof that if the scuppers had been free, there would have been a large quantity of ice on the vessel, and a necessity for throwing off the deck load to save her from foundering. Indeed, from the proof, I think it probable that it was fortunate for all on board of this vessel, and all interested in her hull and cargo, that she had enough of her cargo on deck where it could be promptly jettisoned, and that, had the whole cargo been below deck, the vessel would probably have foundered before enough of the cargo could have been got overboard to relieve her.

As to the second point, that the insurer of the hull is not liable to general average for a jettison of the deck load, the question has been so ably and thoroughly examined and discussed in the light of the authorities in the report of the commissioner, that I do not deem it necessary to do more than state that I fully concur in his conclusions. It is true there would seem at the first glance to be some conflict of authority upon this point, but after a careful examination of the cases cited by the commissioner and by the proctors in their briefs, I think the rule fairly deducible from the modern cases is, that the underwriter upon the hull is liable to contribute to general average for jettison of the deck load, when the custom or usage of the trade in which the vessel is employed, is to carry part of her cargo on deck.

In 1 Parsons on Shipping and Admiralty, 354, it is said: "The rule that the jettison of goods carried on deck gives no claim for contribution, is founded upon the reason that they ought not to be there; whenever it is proper to carry the goods on deck, it might seem to be proper that the voluntary sacrifice of them should be contributed for. The propriety

of so carrying them should be determined in any case, we think, by the custom." On page 356 of the same work, the author further says: "We apprehend the rule should be, that wherever, from the peculiar nature of the goods, or of the voyage, or in fact for any reason, a custom exists to carry goods on deck, and this custom is well established and known, it would bind all the parties interested."

The insurance in this case was for the season, the policy running as a marine risk from the 1st of April to November 30; and the schooner was to be employed in the freight and passenger business in the waters, bays, harbors, rivers, canals and other tributaries of Lakes Superior, Michigan, St. Clair, Erie and Ontario. It is an implied part of this contract of insurance, that in the conduct of her business she would conform to the usages of the trade in which she was engaged. In *Pelly vs. Royal Exchange Assurance Co.*, 1st Burr. 341, Lord Mansfield said: "The insurer, in estimating the price at which he is willing to indemnify the trader against all risks, must have under his consideration the nature of the voyage to be performed, and the usual course and manner of doing it. Everything done in the usual course must have been foreseen and in contemplation at the time he engaged. He took the risk upon the supposition that what was usual or necessary would be done." And in general what is usually done by such a ship with such a cargo in such a voyage, is understood to be referred to by every policy, and to make a part of it as much as if it was expressed. It being clear that it was an established usage on these waters to carry part of a cargo like this upon deck, and that it was deemed not only convenient but prudent to do so, the court must assume that this underwriter intended or contemplated that part of a cargo like this would be stowed on deck, and assumed all the dangers and advantages of such stowage.

It is urged by the learned proctors for the respondent, that the usage must not only extend to the carrying of cargo on deck, but also a custom of the underwriters to contribute by general average for a cargo so carried must be established. But I do not think the custom of the underwriters to pay can be considered as in any respect controlling or modifying the rule as laid down. The underwriter must adjust himself to the custom of the trade which he insures, and the mere fact that the underwriter refuses to pay, can have no bearing upon the question of his obligation and liability. He insures the vessel to engage in the trade in which she is to be employed, according to the usual methods in which that trade is conducted, and must be presumed to have understood and contemplated the ordinary usages of loading and stowing cargo.

As to the third point, that the respondent is not liable because the policy provides that it is "subject to the usages and regulations of the ports of New York on all matters of adjustment and settlement of losses not herein otherwise clearly specified and provided for, to be stated by a competent adjuster of marine losses designated by the insurer." By a stipulation filed in the case it is admitted, "that according to the usage of the port of New York, the loss of a deck load would not be adjusted as a general average loss." This clause I construe only to refer to the manner of making the adjustment where a liability exists or is admitted, and does not control the question of the extent of the liability of the underwriter upon his contract. This clause does not inject into this contract the usage of the port of New York as to the liability of the insurer to contribute for jettison of deck load, for that must be settled by the usage of the trade in which the ship was insured to be employed, but the office of this clause is to make the rules for distributing the loss among those liable to a general average contribution, such as

are used in the "ports of New York," which I think includes not alone the port of New York City, but all the ports of the state of New York, including Buffalo and Oswego, as well as New York City. The extent of the underwriter's liability on this policy is a question of law under the facts, and it is not to be settled by the rules of adjustment in any particular locality. So, too, as to the suggestion that the underwriter had the right to name the adjuster, to make this general average adjustment. The proof shows that the respondent had ample notice of the loss, and if they had claimed the right to appoint or select an adjuster, we must presume it would have been conceded to them under the terms of their policy. But the underwriter in this case having refused to appoint an adjuster, the assured certainly could not lose the benefit of his right to an adjustment, by this mere refusal of the underwriter to name an adjuster.

I conclude then from the authorities which I have examined, and the facts in the case, that there can be no doubt of the liability of this respondent to contribute upon this general average account. The jettison was made for the interest of all concerned. There can be no doubt under the proof that by this jettison, the hull upon which this policy rested, and the remainder of the cargo, as well as the lives of the crew were saved, and I can see no reason why those who are interested in the hull as underwriters should not contribute *pro rata* toward paying for a proper sacrifice for the common good.

The report of the commissioner will be confirmed and a decree for the libellants.

EMILY A. SMITH vs. ASAHEL GAGE *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—APRIL, 1882.

IN EQUITY.

1. PROCEEDINGS UNDER BURNT RECORD ACT—WHO ARE TO BE MADE PARTIES THERETO.—In proceedings under the Illinois Burnt Record Act, all parties who have, or claim to have, any interest in the premises, or to whom any deed of the premises, or any part thereof, has been made and recorded, should be made parties to the suit, and the court is given the power to decide in whom the valid title exists.

2. PARTIES TO SUIT—HOLDER OF TAX TITLE.—In such a suit, a party holding a tax title to the premises is rightly made a defendant, and the court may declare such tax title invalid and set it aside.

3. DECLARING TAX DEED VOID—EQUITABLE CONDITIONS.—Where a party comes into a court of equity seeking to have a tax deed set aside as a cloud upon his title, the court will require as a condition of declaring the tax deed void, that the complainant pay the amount necessary to redeem the premises at the time the redemption expired, with interest, and all subsequent taxes paid by the holder of the tax deed.

Monroe & Leddy, for complainant.

Augustus N. Gage, for defendant.

BLODGETT, J.—This bill was originally filed by the complainant in the State Court, under what is termed the "Burnt Record Act," for the purpose of restoring the complainant's title, the allegations being, in substance, that the complainant had a title in fee to the lot mentioned in the bill, deducible by a chain of conveyances from the United States to herself, all of which were of record in the recorder's office of Cook county, Illinois, and that by the destruction of the records of

the county in the great fire of October, 1871, all these recorded evidences of title had been destroyed; and that she had lost her original deed, and therefore had no paper evidence of title on which to base her claim to the property.

She made various persons parties to the suit, among whom was Asahel Gage, who, she charged, claimed some title to the property. The case came to this court and Gage answered here, setting out in substance that he holds a tax title to the property, which was obtained under a tax sale for the first installment of the South Park assessment, the sale having been made on the 11th of October, 1873, for the assessment of 1872, and the tax deed having been made to him March 3, 1876.

There has been no resistance to the complainant's case except as to whether this tax title can be attacked in this form of proceeding, and as to the validity of this tax deed, complainant having, by an amended bill, charged that the assessment was illegally made, the sale illegally conducted, and the deed void for want of proper notice of the time when the redemption would expire.

As to the jurisdiction of the court to consider and pass upon the validity of this tax title in this form of proceeding, this defendant's claim of title under his tax deed having accrued subsequent to the destruction of the records, I at first had some doubts, but a more careful examination of the statute authorizing this form of action has led me to the conclusion that complainant may, in this action, attack defendant's subsequently acquired title, and my reasons for this conclusion are briefly these:

The act provides,[1] that the petition or bill for restoration of title shall set out:

First—The extent of the estate in the land in question claim-

[1] Chapter 116, section 16, Illinois Revised Statutes.

ed by the complainant or petitioner, and from whom, when and in what mode he derived his title thereto; he shall give the names of all persons owning or claiming any estate in fee in said lands, or any part thereof, and also all persons to whom any such lands have been conveyed, and the deed or deeds of such conveyances as shall have been recorded in the office of the recorder of deeds since the time of the destruction of such records, and prior to the filing of such petition, and their residences, so far as the same are known.

Second—All persons so named in the petition shall be made defendants, and shall be notified of said suit by summons or by publication of notice in the same manner as may be required in chancery proceedings in this state.

Third—By section 18, any person interested may oppose such petition, may demur or answer the bill, or file a cross-bill, if he desires to do so.

Fourth—By section 20, it is declared that it shall be competent for the court, by its decree in such cases, to determine in whom the title in any or all of the lands described in the petition is vested, whether in the petitioner or any other of the parties before the court.

Here, it will be seen, is ample provision for bringing all claimants to any title or interest in the lands before the court, and it is made the duty of the court to determine in which of the persons so before it the title is vested. It seems to me to have been the purpose of the Legislature to make this proceeding a sort of drag-net into which all conflicting claimants of title or interest in the land might be drawn, and where the court, with all the parties before it, should determine their respective rights. It is not limited to titles or claims which accrued before the destruction of the records, but in express terms provides that "all persons to whom such land shall have been conveyed, and the deed or deeds of such conveyance shall have been recorded in the office of the

recorder of deeds of such county since the destruction of the records," shall be made parties to the proceeding; evidently intending that the petitioner must bring in all persons who appear of record to have any deed or conveyance of any interest in the land, so that their respective titles or claims may be considered and passed upon. It is further provided that unknown owners or claimants may be brought in under the designation of "all whom it may concern," and the decree rendered in such proceeding is to be final and conclusive, unless appealed within a certain time limited by the act, except as to persons in actual possession of the premises, or persons to whom the lands have been conveyed, and whose deeds have been recorded since the destruction of the records, and prior to the time of filing the petition, who are not made defendants by name.

It is possible that the court, on the final hearing of such a case, may, in its discretion as a court of equity, where two conflicting titles are presented, the validity of which can be determined in a court of law, by the express terms of its decree, remit the parties holding such titles to a court of law for a trial of their rights; but this would be purely a matter of equitable discretion, and does not limit the power of the court in this proceeding, to settle the entire title by its decree.

As to the validity of this tax deed, no proof is offered showing that the assessment was not regularly and legally made, and the judgment properly rendered against the land for default of payment, nor that the sale was not legally conducted; but the only point insisted upon at the hearing, was that the deed was void for want of proper notice to the occupant of the land, of the time when the redemption would expire.

It is conceded that the holder of the certificate of purchase of this tax sale, assuming that there was no person in possession or occupation of this land, and that the person in whose

name it was assessed could not be found in the county, caused a notice of the time of the purchase at such tax sale and when the redemption would expire, to be published in a newspaper not more than five months, nor less than three months, before the time of redemption would expire, and on filing with the county clerk proof of the publication of such notice, and an affidavit to the effect that the land was unoccupied, and that the person in whose name the land was assessed could not be found in the county, the tax deed in question was issued; but complainant contends that this land was in fact, at the time of this tax sale, and until after the execution and delivery of this tax deed, in the actual possession of a Mrs. McCarthy, and the conflicting proof in the case is all centered around the nature and extent of her occupation of the premises. I think the result of the proof is to show that, some years prior to this assessment and tax sale, the husband of Mrs. McCarthy had built a house on the lot adjoining the lot now in question, and inclosed a portion of the lot in question as a garden and yard, his inclosure taking in about thirty feet of the front of the lot, and extending back in a diagonal line so as to take in six or ten feet of the rear, and some of the out buildings or appurtenances of the McCarthy premises were erected on this lot. McCarthy, it seems, had died before this tax sale, and his widow and family had remained in possession. The fence had become somewhat out of repair, and proof was put in on the part of the defendant, tending to show that it had ceased to be an inclosure; but I think the clear preponderance of the proof is, that a portion of the lot was, at the time this notice was published, in the actual possession and occupancy of Mrs. McCarthy and within her inclosure, that the fence was sufficiently in repair to indicate and maintain such possession, and that an intruder into the portion of the lot within this inclosure, would have been a trespasser upon Mrs. McCarthy's

possession. True, the proof does not show that Mrs. McCarthy was the tenant of this complainant, or of any person through whom the complainant claims title, but I think we must assume she was there with the knowledge and perhaps by the permission of the owner of the fee. She was certainly "an occupant," within the meaning of the Constitution and statutes of this state.[1]

It was the duty of the person seeking to obtain a tax title under a sale for a tax or assessment, to serve personal notice on such occupant as a condition precedent to the issue of a valid tax deed.

But this complainant has come into a court of equity seeking, not only to have her own title established, but also to have this tax title set aside as a cloud upon her title; and under the familiar principle that he who seeks equity must do equity, I think this court should not set this tax title aside and declare it void except on condition that complainant pay the amount required to redeem the premises when the time for redemption expired, and interest thereon at the rate of six per cent. per annum since that time, and also pay all taxes and assessments which the defendant Gage has paid on said premises since his purchase, together with interest thereon at 6 per cent.

It may be urged that a tax title is only to be obtained *strictissimi juris*, and that the defendant, not having complied with the conditions precedent required by the Constitution and statute, must be held to have forfeited the inchoate title acquired by his purchase, and this would probably be the rule in a suit in ejectment upon the facts as I find them here; but the fact is also palpable that the holder of this tax title has paid the assessment—that this payment

[1] Section 5, Article 9, Constitution of 1870, and section 216, Chap. 120, Revised Statutes of Illinois.

and that of the subsequent taxes and assessments has enured to the benefit of this complainant, and she should not have this tax title set aside except upon such terms as will reimburse the defendant for the money he has paid and which has protected her property from forfeiture. The complainant was not obliged to bring this suit. She could, if she had chosen so to do, have brought ejectment, made parol proof of her title, and contested the validity of this tax deed at law, but she has preferred to come into a court of equity to get relief, and must make the defendant whole, as I think, to the same extent as if she had redeemed in apt time from the tax purchase.

H. W. JACKSON, Receiver, etc., vs. IRA FOOTE.

Circuit Court—Northern District of Illinois—April, 1882.

1. Option Contracts—Dealing in Differences—Scope of Illinois Statute.—An agreement between a person and his broker on the Chicago Board of Trade by which he is to deal in time contracts for the purchase and sale of grain, and settle the differences so as to avoid paying for and carrying the commodities bought, does not show an intention to deal in "options to buy or sell at a future time" such as are prohibited by the Illinois statute, though the contracts might be wagering contracts at common law.

2. Construction of Statute—Negotiable Instruments—Gambling Contracts.—The Illinois Statute declaring negotiable instruments given for gambling considerations and gambling contracts void, so far as it relates to dealing in grain, extends only to options to buy or sell at a future time.

3. NOTES GIVEN FOR DIFFERENCES NOT VOID BY STATUTE.—Such statute does not cover dealing in differences, and a note given in settlement of differences, cannot be avoided in the hands of a *bona fide* purchaser, for value, before due, on the ground that it was given in settlement of a gambling contract.

4. SUCH NOTES NOT VOID AT COMMON LAW.—The common law does not declare notes given in settlement of gambling or wager contracts void in the hands of third parties.

Dent & Black and *Lyman & Jackson*, for plaintiff.

L. H. Bisbee and *Albion Cate*, for defendant.

BLODGETT, J.—This is a suit on a guaranty of payment by defendant of two promissory notes of $5,000 each, made by the trustees of the estate of Ira Couch, both dated July 1, 1876, and made payable to defendant, one on July 1, and the other October 1, 1877, with interest at the rate of 8 per cent. per annum. The plaintiff is receiver of the Third National Bank of this city, and the notes in question were delivered to the bank with the guaranty of the defendant written thereon about December 30th, 1876, with other notes, as collateral security for the payment of a note of S. G. Hooker & Co. to the bank, for the sum of $13,900, due from that firm to the bank, for money loaned, the note of Hooker & Co. being dated December 30, 1876, payable to the bank in ninety days after date, with interest at 10 per cent. per annum.

The defense insisted on at the trial is that the two notes in question were transferred by the defendant to the firm of S. G. Hooker & Co. in settlement of a claim of indebtedness due from the defendant to said firm for certain gambling dealings conducted by the firm for the defendant on the Chicago Board of Trade.

The facts, as developed by the proof, appear to be that, in the fall of 1874, and for about two years thereafter, the firm

of S. G. Hooker & Co. were brokers and commission merchants, dealing in grain and provisions on the Board of Trade in Chicago—were members of the Board and transacted business for their customers under its rules and regulations; that Foote had had some dealings on the Board through another broker, in which his broker had taken in and paid for a large quantity of oats which had been bought on an order of the defendant, but the expenses of storing, interest, etc., had been so large that the defendant had become dissatisfied and some difficulty occurred in effecting a settlement with his broker. Mr. Hooker, of the firm of S. G. Hooker & Co. was applied to and counseled with by the defendant in securing this settlement, and Hooker being an old friend of the defendant, advised him that if he wished to speculate or deal any more on the Board of Trade he had better do it with his, Hooker's, firm. The defendant assented to this, provided he could only trade or deal in differences, that is, Hooker's firm was not to take in or carry any commodities bought, but defendant was only to pay or receive the differences between the selling and buying, or buying and selling prices of the commodities dealt in.

In pursuance of this arrangement the defendant from time to time gave orders to Hooker & Co. to buy or sell commodities on the Board for his account, and they executed these orders by buying or selling as directed on the Board in the usual form of such transactions where the seller had the option to deliver within a certain time—as for illustration, during the whole of the next month, or during the first half or last half of the next month, or of the month in which the transaction took place, the only option in the transaction being as to the time within which the seller was allowed to make delivery. These dealings continued until some time in May or June, 1876, Hooker & Co. buying or selling grain, pork, or lard, as directed by the defendant, and settling the differ-

ences, paying the money when the market was against the defendant, and receiving it for him when the market was in his favor, charging to him whatever sums were paid in settling differences when they were against him, and giving him credit when they received differences in his favor. In two or three transactions the firm seem to have taken in and paid for grain and provisions bought for defendant and held them for a short time, and then sold them, charging the defendant with the interest, storage, etc., incident to such transactions. The defendant was also debited on the books of the firm with commissions for transacting the business and with divers sums of money paid him from time to time; so that at the time the dealings of the firm for the defendant closed, he stood debited to them on their books in the sum of about $22,000. In payment of this indebtedness the defendant transferred and delivered to Hooker & Co. four notes of $5,000 each, held by him against the Couch estate, the payment of which notes he guaranteed, and two of which are the notes in question; and the firm of Hooker & Co. transferred the two notes now before the court with the defendant's guarantee of payment thereon to the Third National Bank of Chicago, to secure their own indebtedness to the bank for money borrowed.

The testimony in the case fully satisfies me that Mr. Hooker, when he assumed for his firm to act as the defendant's broker in his dealings on the Board of Trade, did not contemplate or intend to make any different transaction for the defendant than for his other customers. He undoubtedly intended to make purchases or sales where the seller had an option as to the time within which to make delivery, and he intended to so conduct the defendant's transactions as to avoid taking and paying for any article bought; and he seems to have explained to the defendant how, by reason of his many customers, some of whom were sellers and others buy-

ers on the market, he could so manage the defendant's deals that he need not take any commodity bought, but could settle simply the difference between the purchase price and the market price when the seller had the right of delivery. Hooker did not, I am satisfied from the proof, intend to deal in "options to buy or sell at a future time," such as are prohibited by the Illinois Statutes, (Revised Statutes of Illinois, chap. 38, section 130,) but intended, as I have said, to deal in time contracts and to settle the differences so as to avoid paying for and carrying the commodities bought.

I am also satisfied that, while the defendant may have known but little when he commenced with this firm as to the mode in which the business was to be transacted by them for him, yet he did not contemplate dealing in "puts and calls" or "options to buy and sell at a future time;" and that he was very soon aware of the forms and modes in which the business was done for him by the firm. He intended, without doubt, that his brokers should so manage his trades that differences should be paid or collected instead of his taking and holding the article dealt in, or having his broker do it for him and at his expense. He may have contemplated dealing wholly in differences to such an extent as to make the transactions such as have been construed by the courts of this state to be wager contracts or gambling contracts at common law; but he did not, I am satisfied, intend that his brokers should make for him such contracts as are expressly made illegal by the Illinois Statutes; but at most they were to be transactions where it was not intended that any commodity should be actually received or delivered, but that he was to deal in differences only, coming, perhaps, within the rule laid down by the Supreme Court of this state, in *Lyon vs. Culbertson*, 83 Illinois, 33, where the court said: "The fact that no wheat was offered or demanded, shows that neither party expected the delivery of any wheat, but in case of

default in keeping margins good, or even as to the time for delivery, they only expected to settle the contract on the basis of differences, without even performing or offering to perform his part of the agreement; and if this was the agreement, it was only gaming on the price of wheat, if such gambling transactions shall be permitted, it must eventually lead to what are called 'corners,' which engulf hundreds in utter ruin, derange and unsettle prices, and operate injuriously on the fair and legitimate trader in grain as well as the producer, and are pernicious and highly demoralizing to the trade. A contract to be thus settled is no more than a bet on the price of grain during, or at the end of a limited period. If the one party is not to deliver or the other to receive the grain, it is in all but name a gambling on the price of a commodity, and the change of names never changes the quality or nature of things." In other words, as I understand the court in this case, where there is an intention to deal only in differences, the transaction is held to be a wager contract at common law.

It is also equally evident from the proof, that the indebtedness which accrued from the defendant to S. G. Hooker & Co., was for commissions earned by the firm in making trades for the defendant, duly authorized by him, and for moneys actually paid by the firm in the settlement of differences in such trades, and that none of these differences were paid upon "options to buy or sell grain or other commodities at a future day," but upon sales or purchases of grain, or other commodities where the seller had only an option as to the time of delivery, contracts which have been held not to be within the Illinois statute, and to be valid and binding upon the parties.[1]

[1] *Pixley vs. Boynton*, 79 Illinois, 351; *Wolcott vs. Heath*, 78 Illinois, 433; *Cole vs. Milmine*, 88 Illinois, 349; *Porter vs. Viets*, 1 Bissell, 177; *Clark vs. Foss*, 7 Bissell, 540; *Sawyer vs. Taggart*, 14 Bush, 727; *Gilbert vs. Gaugar*, 8 Bissell, 214.

Assuming, then, that the defendant by his agreement with Hooker & Co. intended to deal only in differences, and that the bulk of the debit against him on the books of the firm accrued for differences paid by the firm on trades made for him in pursuance of this agreement, the only question is, do these facts so taint this paper as to make this guaranty of payment void in the hands of this bank?

There is no dispute but what the bank is a *bona fide* holder of these notes with defendant's guaranty thereon, taken for value before due, and without notice of any defense. The statute of Illinois makes notes and other securities given in payment of gambling contracts to sell or buy grain or other commodities at a future time, void in the hands of any assignee or holder; but the transaction out of which this indebtedness between Hooker & Co. and the defendant arose, were not "options to buy or sell at a future time," but were contracts of sale in which the seller was bound to deliver at a future time within certain limits. They were not, therefore, gambling contracts within the Illinois statute; they may have been, as I have already said, gambling or wager contracts at common law to such an extent, as that if Hooker & Co. had sued the defendant, he could have successfully defended; but the common law will not help either party to a gambling contract. It simply leaves them where it finds them. If one, having lost money by gaming or on a wager, pays it, the law will not aid him to recover it back from the owner.[1]

It seems to me to follow then as a necessary conclusion that the defendant having delivered these notes with his guaranty upon them to Hooker & Co. in settlement of their demand against him, even though their demand was tainted as a gambling claim at common law, he cannot be heard to set

[1] 2 Smith's Leading Cases, 288; *Gregory vs. King*, 58 Illinois, 169.

up the illegality of the dealings between himself and Hooker & Co. as a defense to these guarantees in the hands of a *bona fide* holder. He has put this paper with his guaranty affixed to it afloat upon the market. Unless a clear case of violation of the statute is made out, and the burden of making such a case is upon the defendant, this guaranty in the hands of a *bona fide* holder is valid, and not tainted by any of the equities between the original parties. I may say further that it seems from the defendant's own testimony and from the accounts rendered, a transcript of S. G. Hooker & Co.'s books, that the settlement in question and upon which these notes and guarantees were given, was for an account into which cash paid, commissions, and other elements entered which were not of a gambling nature, and it is extremely doubtful in my mind, even if suit had been brought by S. G. Hooker & Co., against the defendant, if he could, upon the showing now made upon this trial, have successfully defended against their claim.

The issues are found for the plaintiff.

The buying and selling of stocks or other commodities upon speculation is not of itself illegal: *Smith vs. Bouvier*, 70 Pa. St. 325; neither is selling short for future delivery, even though the seller can only obtain the goods sold by purchasing them subsequent to the sale: *Hibblewhite vs. McMorine*, 5 M. & W. 462; *Mortimer vs. M'Callan*, 6 M. & W. 58; *Maxton vs. Gheen*, 75 Pa. St. 166; *Williams vs. Tiedemann*, 6 Mo. App. 269; *Clark vs. Foss*, 7 Biss. 540; *Porter vs. Viets*, 7 Biss. 177; *Stanton vs. Small*, 3 Sandford, 230; *McIlvaine vs. Egerton*, 2 Robt. 180; *Rumsey vs. Berry*, 65 Me. 570; *Gregory vs. Wendell*, 39 Mich. 337; *Wolcott vs. Heath*, 78 Ills. 433; *Pickering vs. Ccase*, 79 Ills. 330; *Pixley vs. Boynton*, 79 Ills. 351; *Cole vs. Milmine*, 88 Ills. 349; *Noyes vs. Spaulding*, 27 Vt. 420; and the fact that the seller reserves an option to deliver in fulfillment of the contract any time during a certain month, does not render the contract illegal: *Gilbert vs. Gauger*, 8 Biss. 214; *Wolcott vs. Heath*, 78 Ills. 433; *Pixley vs. Boynton*, 79 Ills. 351; *Logan vs. Musick*, 81 Ills. 415.

Some of the courts hold that option contracts whereby one party for a consideration agrees to purchase from or sell to the other at the option of the latter within a limited time and at a specified price, are not *per se* in-

valid, and no presumption will be entertained that they are merely a form for betting on the differences in values according to the fluctuations of the market: *Tyler vs. Barrows*, 6 Robt. 104; *Bigelow vs. Benedict*, 70 N. Y. 202; *Story vs. Salomon*, 71 N. Y. 420; *Harris vs. Tumbridge*, 83 N. Y. 95; *Williams vs. Tiedemann*, 6 Mo. App. 269; but such is not the rule in Illinois, where such contracts are held to be gambling contracts: *Pickering vs. Cease*, 79 Ills. 328; Illinois Revised Statutes, chapter 38, section 130.

But contracts for the sale of property to be delivered at a future time, where it is not the intention of the parties that the property shall be delivered either by consignment or the transfer of warehouse receipts, but that the contracts shall be adjusted and settled by the payment of differences, are void as gambling contracts: *In re Green*, 7 Biss. 338; *Grizewood vs. Blane*, 11 C. B. 526; *Lyon vs. Culbertson*, 83 Ills. 33; *Gregory vs. Wendell*, 39 Mich. 337; *Brua's Appeal*, 55 Pa. St. 294; *Rumsey vs. Berry*, 65 Me. 570; *Bigelow vs. Benedict*, 70 N. Y. 202; *Gheen vs. Johnson*, 90 Pa. St. 38; *Ruchizky vs. De Haven*, 97 Pa. St. 202; *North vs. Phillips*, 89 Pa. St. 250; *Barnard vs. Backhaus*, 52 Wis. 597; *Everingham vs. Meigham*, 55 Wis. 362; *Melchert vs. American Union Tel. Co.* 3 McCrary, 521.

But if the contract was valid in its inception and not tainted with any gambling intent, the fact that at the time for its fulfillment instead of delivering and receiving the article sold, the parties settle on the basis of differences, does not render the contract void as a wager contract: *Clark vs. Foss*, 7 Biss. 540; *Gilbert vs. Gaugar*, 8 Biss. 214; *Fareira vs. Gabell*, 89 Pa. St. 89; *Sawyer vs. Taggart*, 14 Bush (Ky.) 727.

The law looks at the intention of the parties, and the question whether a contract is a wagering one or not, is one of intention as deduced from the facts and surrounding circumstances. If the evidence taken as a whole shows that the parties did not really intend to buy or sell, and that there was no intention on the one side to deliver or on the other to receive the commodity bargained for, but that the real purpose was to make a wager in the form of a contract, then the contract is void as a gambling transaction. The law goes behind the form of the contract to determine whether the parties were actually trading or betting: *Bigelow vs. Benedict*, 70 N. Y. 202; *Pixley vs. Boynton*, 79 Ills. 351; *Grizewood vs. Blane*, 11 C. B. 526; *In re Morgan*, 2 De G. F. & J. 684. And where the evidence showed that the customer was simply engaged in buying and selling on margin, without any intention of actually receiving or paying for the stock bought, the transaction as between him and the broker was considered a gambling one: *Gheen vs. Johnson*, 90 Pa. St. 38.

So if a minor of limited means embarks in stock speculations to a large amount by way of margins, the court will infer even in the absence of direct evidence, that there was no intention to complete the contracts by actual delivery, but simply to bet on differences, and in such case the minor can recover back from his broker the margins lost in such transactions:

Ruchizky vs. De Haven, 97 Pa. St. 202. See also *In re Green*, 7 Bissell, 338.

But in order to render the contract void as a deal in differences merely or a wager on the market price, it must have been so understood by *both* parties. While it is a question of intent, in order to render the contract an illegal gambling transaction it must have been so understood by both buyer and seller, and the fact that one of them only intended to merely speculate or gamble in differences, does not render the contract unlawful: *Clark vs. Foss*, 7 Biss. 540; *Williams vs. Carr*, 80 N. C. 294; *Sawyer vs. Taggart*, 14 Bush. 727; *Williams vs. Tiedemann*, 6 Mo. App. 269; *Grizewood vs. Blane*, 11 C. B. 526; *Pixley vs. Boynton*, 79 Ill. 357.

The illegaliy is matter of defense, and the burden of proof to show that the contract was not *bona fide*, is upon the party setting up its illegality; and the intent of the parties and the nature of the contract is a question of fact to be decided by the jury: *Bigelow vs. Benedict*, 70 N. Y. 202; *Grizewood vs. Blane*, 11 C. B. 526; *Pixley vs. Boynton*, 79 Ill. 351; *Williams vs. Carr*, 80 N. C. 294; *Gregory vs. Wendell*, 39 Mich. 337. But in *Porter vs. Viets*, 1 Biss. 177, it was held that in case of a valid written contract for future delivery, it was not allowable to go outside of the contract to show that the intention of the parties was to deal in differences merely. And in *Barnard vs. Backhaus*, 52 Wisconsin, 597, the court said that in order to uphold a contract for the sale and future delivery of grain "it must affirmatively and satisfactorily appear that it was made with an actual view to the delivery and receipt of the grain, and not as an evasion of the statute of gaming, or as a cover for a gambling transaction;" thus seeming to throw the burden of proof on the party seeking to uphold the contract. And see *Everingham vs. Meigham*, 55 Wisconsin, 362.

If the intention of the customer is merely to speculate in wager contracts, and the broker is aware of such intention, the fact that the other parties with whom the broker contracts for the client, are acting *bona fide* will not destroy the gambling nature of the contracts as between the broker and client, where the former sues the latter for advances and commissions: *Fureira vs. Gabell*, 89 Pa. St. 89.

The broker can recover commissions, and for advances he has made to meet his client's losses on contracts for future delivery, unless it be shown that the parties merely intended to deal in differences: *Williams vs. Carr*, 80 N. C. 294; and in some cases it has been held that the broker could recover although the client was only speculating in differences: *Brown vs. Speyers*, 20 Grattan, 296; *Lehman vs. Strassberger*, 2 Woods, 554. And if the broker in good faith makes a contract for his client, and when the margins are exhausted settles on the basis of differences, he can recover the amount he has advanced: *Rumsey vs. Berry*, 65 Me. 570; *Gilbert vs. Gauger*, 8 Biss. 214.

But if the broker knew that his client was only speculating in differences, he cannot recover for commissions nor for advances, even though the client has given notes in settlement: *Fareira vs. Gabell*, 89 Pa. St. 89; *Barnard vs. Backhaus*, 52 Wis. 593; *Everingham vs. Meigham*, 55 Wis. 355; *In re Green*, 7 Biss. 338; and neither can the client recover from the broker the money he advanced as margins: *Gregory vs. Wendell*, 39 Mich. 337.

But a note given in settlement of a void option deal which is a mere gambling transaction, can be enforced by a *bona fide* purchaser for value without notice, before due: *Third Nat. Bank vs. Harrison*, 8 McCrary, 316.

Consult also, *Williar vs. Irwin*, *ante*, page 57. [*Reporter.*

HENRY W. PUTNAM vs. CHARLES G. HUTCHINSON. And two other cases.

Circuit Court—Northern District of Illinois—April, 1882.

In Equity.

1. Patents—Part Disclaimed in Original cannot be Claimed in Re-issue.—Where the examiner of the Patent Office denies an application for a patent on the ground that the broad claim therein is anticipated by a prior device, and the applicant amends and files a disclaimer as to the part rejected by the examiner, neither he nor his assignee obtaining a re-issue covering the broad claim in the first application, can sustain such re-issued patent as to the claims covered by the disclaimer, on the ground that the decision of the examiner in the first instance rejecting such claims was erroneous, and that the claims were not in fact anticipated.

2. Enlargment of Claim in Re-issue—Mistake.—While the claim in a re-issued patent may be enlarged, this can only be done when an actual mistake has occurred.

8. Refusal of Examiner to Pass Claim—Re-issue.—The erroneous refusal of the examiner to pass a claim, is not such a mistake as will entitle the inventor to a re-issue covering that claim.

4. Assignee of Patent—Rights of.—An assignee of a patent takes it subject to any disclaimer by the inventor and is not entitled to a re-issue covering such disclaimer.

5. Bottle Stoppers—Re-issued Patent 9,002.—The first three claims of Re-issued Patent No. 9,002, for an improvement in bottle-stoppers, are invalid.

J. P. Altgeld, B. F. Thurston and *A. von Briesen*, for complainant.

West & Bond, for defendants.

Blodgett, J.—The complainant in these cases charges defendant with the infringement of re-issued patent No. 9,002, issued to complainant on the 23d of December, 1879 (on application for re-issue, filed October 30, 1879,) as assignee of Joel B. Miller, for an "Improvement in Bottle Stoppers;" the original patent having been issued to Miller on the 27th of October, 1874, No. 156,302. The bill prays an injunction and an accounting in the usual form.

The original patent was for an internal bottle stopper, with a handle or bail hinged to the stopper, passing upward through the neck of the bottle, made staple-shaped, the upper end or top being formed into a loop large enough to prevent it from dropping into the bottle, the bail being made of steel wire or other elastic metal, so that the two legs of the staple or bail would form springs which pressed against the throat of the bottle. By this handle or bail the stopper could be drawn up into the throat, when it was desired to close the bottle, or pushed downward for the purpose of opening it; and the two legs of the bail pressing against the sides of the throat aided in holding the stopper in place. In his application for a patent, Miller claimed broadly, "an attachment

to a bottle-stopper, by means of which a stopper inside the bottle may be operated to open or close the throat of the bottle, substantially as shown and described."

This claim was rejected by reference to the patent of Parkhurst.

Amended specifications were filed, and the application again rejected upon the same reference.

Another amendment was made with claim in the following words:

"What I claim is:

"The stopper B, located inside the bottle, provided with a bail or handle C, pivoted or hinged to the stopper, and having a loop or eye F at its upper end, as and for the purpose described."

This was rejected on reference to the invention of W. H. Hall, filed May 30, 1868.

Miller then took leave to again amend, and filed substantially the same specifications, containing the following disclaimer: "I am aware that internally located bottle-stoppers have been provided with vertical rigid handles or stems for manipulating the same, but owing to the rigid character of the handle, the stopper is apt to be forced down into the bottle during transportation, and furthermore, in dispensing the contents of the bottle, a rigid handle will interfere with the free flow of the liquid."

And upon this last specification and disclaimer, a patent was issued to him with the following claim: "The internally located bottle-stopper B, provided with a hinged or jointed handle or bail, C, composed of two elastic legs or branches and an eye or finger-loop, as and for the purpose set forth."

Miller having died, the complainant in October, 1879, obtained an assignment of the patent, and procured the re-issue now before the court, in which he was permitted to eliminate the disclaimer from the patent, and was allowed four claims

instead of one. The first three of these new claims cover a bottle-stopper with a bail or staple-shaped handle or stem, fixed rigidly to the stopper; while the fourth claim of the re-issue is substantially the same as the single claim of the original patent. In these cases the defendants are charged with infringing the three new claims obtained by the re-issue.

In other words, complainant has been allowed to claim and cover by his re-issue the very feature or element in bottle-stoppers of this class, which by the disclaimer in his original patent he said were old and not the subject-matter of a patent; and the sole contest in these cases is as to the validity of these additional claims. Can complainant after the death of Miller, who made all the invention there is in this patent, be permitted to reclaim what Miller had solemnly disclaimed and declared was old?

The defendants make and use bottle-stoppers with a spring bail or handle rigidly attached to the stopper; and on one of them Charles G. Hutchinson has obtained a patent, dated in April, 1879, over six months before this re-issue was made, for a bottle-stopper, substantially like that which all the defendants are making and using.

This re-issued patent was before the U. S. Circuit Court for the District of Connecticut, in the case of this complainant *vs.* Tinkham, in October, 1880, and the learned District Judge of that district held the re-issue void as to these new claims, on the ground that it appears upon its face to be a different invention from that described in the patent; and upon the same testimony this court would of course feel bound by that decision: *Putnam vs. Tinkham*, 4th Fed. Reporter, 411. But it is urged that the proof in these cases differs from that in the case before Judge Shipman, for the reason that additional papers from the file wrapper of the original Miller patent and the Hall drawing are before us, and it appears from these that the Hall bottle-stopper re-

ferred to was shown only in a rejected application on file in the patent office; that Hall never had a patent for his device.

Prior to the decision of *The Cornplanter Patent*, 23 Wall. 181, it was the practice of the Patent Office to refuse patents when the device was shown in rejected applications on file in the office; but the court held in those cases that such rejected applications must be considered as abandoned experiments, and should not be allowed to defeat a patent.

The drawing of the Hall application, which is now before the court for the first time in the litigation over this re-issued patent, shows a handle or stem, rigidly attached to an internal stopper, and projecting up through the throat of the bottle, where it was held in place by a spiral spring and a bar reaching across the mouth of the bottle.

It seems to me that the additional proof does not relieve this re-issue from the objections made to it in the Tinkham case; and I do not think it would have changed the result if this new proof had been before the court in that case.

The difficulty with this patent is that Miller, who must be presumed to have known what he had invented, solemnly told the whole world by his disclaimer that he was not the inventor of an "internally located bottle-stopper, with a rigid stem or handle." It is true, that his device differed from that to which reference was made, in that his contained the element of the bow or spring which pressed upon the sides of the throat of the bottle, and thereby aided in holding the stopper in place, either opened or closed. But for the sake of obtaining his patent upon the hinge or joint by which the bail was attached to the stopper, and which he seems to have deemed the most material or valuable part of his invention, he abandoned this bow or staple-shaped spring element to the public. When he was referred to this Hall device, with its straight, rigid stem, as anticipating his invention, he should have appealed from the examiner who

decided against him, but instead of doing so, he at once acquiesced in the decision, abandoned the bail rigidly attached to the stopper, and took his patent only on the hinged bail, thereby freely surrendering to the public all the features of his stopper, which differed from Hall's, except the hinged or jointed spring bail. He reserved the spring bail, but it was a spring bail jointed to the stopper.

Since these cases were argued, the Supreme Court has decided the case of *Miller vs. Bridgeport Brass Company*, 104 United States, 350, and some part of the opinion bears so pertinently upon the validity of this re-issue, that I quote from it:

"Now, whilst, as before stated, we do not deny that a claim may be enlarged in a re-issued patent, we are of opinion that this can only be done when an actual mistake has occurred; not from a mere error of judgment (for that may be rectified by appeal,) but a real *bona fide* mistake, inadvertently committed, such as a court of chancery, in cases within its ordinary jurisdiction, would correct. Re-issue for the enlargement of claims should be the exception and not the rule. And when, if a claim is too narrow—that is, if it does not contain all that the patentee is entitled to—the defect is apparent on the face of the patent, and can be discovered as soon as that document is taken out of its envelope and opened, there can be no valid excuse for delay in asking to have it corrected. Every independent inventor, every mechanic, every citizen, is affected by such delay and by the issue of a new patent with a broader and more comprehensive claim. The granting of a re-issue for such a purpose, after an unreasonable delay, is clearly an abuse of the power to grant re-issues, and may justly be declared illegal and void. It will not do for the patentee to wait until other inventors have produced new forms of improvement, and then, with the new light thus acquired, under

pretence of inadvertence and mistake, apply for such an enlargement of his claim as to make it embrace these new forms. Such a process of expansion carried on indefinitely, without regard to lapse of time, would operate most unjustly against the public, and it is totally unauthorized by the law. In such a case, even he who has rights and sleeps upon them, justly loses them."

The re-issue now before me was not obtained on any valid claim or pretext of "inadvertence or mistake." All that could have been urged is what is urged here, that the examiner had denied an application for the patent on the ground that he deemed it anticipated by the device of Hall. This was not, I think, an "inadvertence or mistake," within the meaning of the patent law, such as entitled Miller's assignee to a re-issue. It was at most an erroneous ruling, by an officer having *quasi* judicial powers, and which could have been appealed from and presumably corrected, for *The Cornplanter Patent Case* was decided within a month or two after Miller's application was denied on the Hall reference; but Miller conceded the correctness of the ruling, and disclaimed the rigid bail or stem, with or without the spring element, and took his patent on the hinged bail alone. I think Putnam, when he bought his patent, took it with all the concessions Miller had made for the purpose of obtaining it, and should not have been allowed in the re-issue to claim that which Miller had surrendered; especially after so much time had elapsed and the public had, as the proof shows in this case, begun the use of that which Miller had made public property. For these reasons I must dismiss these bills, on the ground of the invalidity of the first three claims in the re-issue, which are the only ones the defendants are charged with infringing.

HENRY W. PUTNAM vs. CHARLES G. HUTCHINSON.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—APRIL, 1882.

1. CONSTRUCTION OF PATENTS—BOTTLE-STOPPERS—EQUIVALENTS—INTERFERENCE OF PATENTS.—The *fourth* claim of re-issue patent No. 9,002, issued to complainant, is for an internal bottle-stopper, provided with a hinged or jointed bail, which is composed of two elastic legs or branches, and of an eye or finger loop, the stopper shown in the drawings being a "plug" stopper. Defendant's patent, No. 225,476, consists of a "disk" or "valve" stopper and a bail substantially like complainant's except that the loop has an enlargement or bulge lower down, and below the top loop. *Held, first*, that the disk stopper being old at the date of complainant's patent, it is a mere equivalent which cannot be substituted by defendant in order to evade complainant's patent; *second*, that the bulge or enlargement in defendant's patent is a mere mechanical modification in the practical application of complainant's device; and, *third*, that defendant's patent is void by reason of its interference with complainant's re-issued patent.

2. FIRST THREE CLAIMS OF RE-ISSUE NO. 9,002 DECLARED VOID.—On comparison of complainant's re-issued patent with the original, the court finds the first three claims of the re-issue void as being for a different invention than that described in the original.

3. The fourth claim of re-issued patent No. 9,002, is valid.

J. P. Altgeld, B. F. Thurston and *A. von Briesen*, for complainant.

West & Bond, for defendant.

BLODGETT, J.—This is a bill filed by complainant, as owner of re-issued patent No. 9,002, and asking to have a patent issued to Charles G. Hutchinson, defendant, on the 16th day of March, 1880, and numbered 225,476, set aside and

declared void on the ground that defendant's patent interferes with the complainant's re-issued patent, and is a cloud upon complainant's title, the proceeding being based on section 4918, of the Revised Statutes.

The defendant's answer denies the validity of the original and re-issued patent held by complainant, and denies the interference of the two patents; and insists, further, that the re-issued patent of complainant is void because it contains new matter not described in the original patent.

The original patent of which complainant's patent is a re-issue, was issued to Joel B. Miller on the 27th day of October, 1874, for an improvement in "bottle-stoppers;" and by his original patent, Miller claimed as his invention "the internally located bottle-stopper B, provided with a hinged or jointed handle or bail C, composed of two elastic legs or branches, and an eye or finger-loop, as and for the purpose set forth;" and in the re-issue, the *fourth* claim is in these words: "The internal bottle stopper provided with a hinged or jointed bail C, which is composed of two elastic legs or branches *a*, and of an eye, or finger-loop, substantially as herein shown and described."

The only question in this case is whether the patent of Hutchinson, No. 225,476, interferes with the *fourth* claim of the re-issued patent of complainant, and whether the fourth claim of the re-issued patent is valid.

The distinctive characteristic of the complainant's original and re-issued patent is the spring bail C, which is hinged or joined to the stopper, this spring bail passing from the stopper up through the neck of the bottle, and being so adjusted as to press against the neck of the bottle so as to hold the stopper in place either when the bottle is open or closed, or to prevent the stopper from falling into the bottle when the bottle is opened for the purpose of discharging its contents. This spring loop is made staple shaped—that is,

of two legs or branches which bow outwards so as to form springs, which bear against the sides of the throat of the bottle, and the lower ends of this bail are clasped or bent around the loop or eye of the stopper in such manner as to form a joint or hinge and allow the legs of the bail to spring or bend inwardly or outwardly as they are pressed down or drawn up for the purpose of opening or closing the bottle. A cursory examination of the drawings accompanying the original specifications of the Miller patent shows that it was intended that the pressure of the spring against the throat of the bottle should aid in holding the stopper in place when the bottle was closed as well as when the bottle was open. It will be seen from the drawings in the original patent that this bail is intended to bear or press outwardly against the sides of the throat of the bottle so as to hold the stopper in place.

The defendant's patent describes, quite at length, the manner in which he constructs his bottle-stopper. His stopper is what is known as the "disk" or "valve stopper," in contradistinction to the plug shown in the device of Miller.

This disk stopper is made by inserting a disk of rubber or other suitable elastic material between two smaller metal disks so as to hold it firmly in place, and to the upper side of the upper disk is attached an eye or loop, precisely in its mode of construction and operation like the eye or loop attached to the stopper, described and shown in the Miller patent. To this eye or loop is attached the bail or handle F, which is, for all intents and practical purposes, the complainant's bail C, except that the defendant has more minutely and specifically described the shape of his bail—showing that it has an enlargement or bulge below the top loop—which is accomplished by making an additional bend in the legs of the bail.

It is contended by the defendant that the complainant is

confined in the construction of stoppers under his patent to a plug, such as is shown in his original drawings; but it will be observed that neither in the original nor re-issued patent of Miller, is any stress laid upon the manner in which the stopper is to be constructed, and disk or valve stoppers are shown by the proof to have been old at the time Miller's patent was granted, and it is obvious that the defendant's disk is but the substitute and equivalent for all practical purposes, of the plug shown in complainant's drawings. There can be no doubt, from the authorities, that the substitution by defendant of this well known disk for the plug, is a mere colorable evasion of the complainant's device. Indeed, I have no doubt that the complainant, in the construction and use of his device, had the right to use a disk as a stopper in his bottles, instead of a plug; and the proof shows that before the defendant applied for his patent, the plaintiff was manufacturing disk bottle stoppers under his re-issued patent, substantially the same as those described in defendant's patent. The right of the complainant to change the form of construction from that shown in his patent, and substitute a well known equivalent for it, is fully established in *Gould vs. Rees*, 15 Wall. 187; *Vogler vs. Semple*, 7 Bissell, 382; *Webster vs. Carpet Co.*, 5 Off. Gaz. 522; *Storrs vs. Howe*, 4 Clifford, 388; *The Cornplanter Patent*, 23 Wall. 181.

The authorities above cited show abundantly that complainant could maintain a suit for infringement against any one who makes disk bottle-stoppers combined with the other elements of his fourth claim. That is, under his patent on the combination of a stopper with a hinged bail, he covers any form of stopper then known, which he chooses to adopt.

As I have already said, the defendant's loop, F, is substantially the complainant's bail C, although he describes in detail what he insists is a modification or improvement of its shape in the following terms: "The loop formed by the

spring F is centrally contracted so that it conforms to the contracted part of the neck of the bottle to a greater or less extent." The plain statement of this description is that defendant makes a bulge or enlargement in his bail below the finger-loop, so that when the bottle is closed the bulge is drawn above the throat and aids in keeping the stopper in place, and when the bottle is open the bulge is below the most contracted part of the neck, and keeps the stopper from falling back into the throat of the bottle as the contents are discharged. But it is noticeable that the bulge and contracted part of the bail, so carefully described by defendant, is substantially shown in the drawings accompanying the original and re-issued Miller patent, although Miller does not describe them in his specifications, and the only perceptible difference between the shape of the bail, as shown in complainant's and defendant's patents, is that defendant's bulge or enlargement is a little lower down or nearer the joint, obviously to adapt it to the throat of a bottle somewhat different from that shown in complainant's drawings.

But even if this bulge or enlargement shown in defendant's patent was not also shown in complainant's, I should deem it one of those modifications of construction which is allowable in the practical application of any patented device, and contains no element of invention. It is simply a practical application of the Miller bail to the different forms of bottle necks so as perhaps to make it more convenient in use; but it is only such a mechanical change or improvement as would naturally suggest itself to a person using the device.

It is also urged that stoppers and bails under the Miller patent must be so constructed as to permit of the bail being turned down over the neck of the bottle. It is true that in a statement of the utility of his stopper, Miller states in his specifications that the bail could be turned away from the neck of the bottle so as to avoid displacement of the stopper,

but I do not understand that he made that a necessary element in his bail, because whether the top of the stopper can be drawn sufficiently near the mouth of the bottle to permit the bail to be turned away by the joint, depends wholly on the shape of the neck of the bottle. The bottle neck may be so shaped that the stopper cannot be drawn or forced near enough to its mouth to allow the bail to be turned away.

There can be no doubt, I think, that the Hutchinson patent is for essentially the same device which is described in the fourth claim of complainant's re-issued patent, and such being the fact, there can be no doubt that it interferes with the complainant's patent, and there is a complete failure of proof showing the invalidity of the fourth claim of complainant's patent. The proof certainly shows that Miller invented the hinged bail C, and there is no proof that this had been anticipated in the older art. If this fourth claim of the re-issued patent is valid, then the patent is so far valid; and the question of the validity or invalidity of the other claims is not material to the merits of this case.

I conclude, therefore, that complainant is entitled to a decree declaring Hutchinson's Patent No. 225,476 void, by reason of interference with complainant's re-issued patent No. 9,002.

I have already held in the cases of the same complainant against this and other defendants, that the first three claims of this re-issued patent are void by reason of their not being for the same invention described in the original Miller patent.

And defendant insists that if the court finds his patent void for interference, there should also be a finding that the three first claims of complainant's patent are void. As I have already said, the defendants charge in their answer the invalidity of complainant's patent, and proofs are in the

record bearing upon that question. The statute under which this proceeding is instituted authorizes the court to declare either of the patents void, in whole or in part. And as it only requires a comparison of the original and re-issued Miller patents to determine the invalidity of the three first claims of the re-issue, I deem it proper to find and declare that the three first claims of complainant's re-issued patent are void, and that only the last or fourth claim of said patent is valid.

FRANCES A. BEECHER, EXECUTRIX, ETC., vs. CHICAGO & NORTHWESTERN RAILWAY COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—APRIL, 1882.

IN EQUITY.

1. LAND GRANTS—TRUSTEE—WASTE.—Where lands were granted to a certain railway in aid of construction, and upon foreclosure of a mortgage upon such railway the lands were transferred, under an arrangement, to another railroad company which issued certificates therefor entitling the holders to proportionate shares of the land after a certain time, such railroad company was a naked trustee for the purposes named, and not liable for not preventing trespasses and waste upon the lands while so held by it.

2. SAME.—But if the company participated in committing, or received the proceeds of the waste, it will be compelled to account therefor to the equitable owners.

John N. Jewett, for complainant.

B. C. Cook, for defendant.

DRUMMOND, J.—The bill in this case is founded on the theory that the defendant was the trustee for a series of years, of certain timber lands in Wisconsin, the chief value of which, at the time, consisted in the timber growing upon them, and that it was the duty of the defendant, as such trustee, to exercise reasonable diligence in preserving the timber, and preventing waste, and that was not done. It was also founded on the allegation that the defendant directly permitted timber to be cut. The lands were granted in 1856 by Congress to the state of Wisconsin, for the purpose of aiding in the construction of railroads in that state. The state granted some of them to a railroad company, which mortgaged them to secure a certain indebtedness, and upon foreclosure proceedings under the mortgage, the lands were transferred to the defendant, a corporation created by the laws of Wisconsin and Illinois. The defendant agreed that the land should be devoted to the payment of certain indebtedness of the railroad company to which the land had been granted by the state. This arrangement was completed in 1859. At that time the conditions upon which the land had been granted by Congress not having been complied with, the title still remained in the United States, and therefore a good title could not be made to those who represented the indebtedness of the railroad company already mentioned.

In consequence of this, the defendant executed and delivered to the bondholders representing that indebtedness, what were denominated, "convertible land grant certificates," which set forth that the defendant held the lands by virtue of the laws of Wisconsin, and "certified" that after the first day of July, 1860, the holders of these bonds were entitled, on presentation of the certificates, to a deed for a proportionate share of the land, in accordance with the legal subdivisions which the defendant might receive on the completion of that portion of the railroad referred to in the

acts and grants, in the proportions named in the certificates. These certificates were delivered to the bondholders, upon the surrender of the bonds held by them. They were assignable, and the plaintiff's testator acquired a large amount of them. While the lands were thus held by the defendant, the most valuable part of the pine timber standing upon them at the date of the certificates and at the time the title was acquired by the railroad company (1861,) was cut off and removed. In 1868, the Legislature of Wisconsin authorized the defendant to take proceedings in any Circuit Court of the state for a partition of the lands amongst the holders of the certificates, and under the authority of this statute, proceedings in partition were instituted in the Circuit Court of Milwaukee county. The certificate holders did not appear; publication was made, defaults were entered, reference was made, and the referee reported that it was impracticable to partition the land among the various certificate holders, and a sale was ordered. In the decree of sale, provision was made that the certificates might be used in the purchase of land, upon certain terms. At these sales, made under the order of the court, the lands were all sold. The plaintiff's testator was a purchaser of lands at the sale.

The main question in the case is, whether the defendant is liable for the timber cut down and removed from the lands, and if so, what is the nature and extent of its liability.

There seems to be no question made by the defendant, growing out of the consolidated character of the corporation under the laws of Wisconsin and of Illinois, nor that the subject-matter of this controversy relates to lands held in trust in the former state.

I do not think that the general theory upon which the bill is framed can be maintained, viz.: that because the lands were held by the defendant under the circumstances named

for a particular purpose, the defendant was obliged to protect them from trespasses and waste. The plaintiff's testator was one of the beneficiaries under the trust, and under the laws of Wisconsin he undoubtedly had the right to take the proceedings necessary to protect the land in which he had an interest from the depredations of trespassers.

But the defendant was a mere naked trustee for the purpose named, even if the title was acquired from the United States and vested in the company in 1861. Before the proceedings in partition took place under the special act of the Legislature which has been referred to, it was competent for the plaintiff's testator to take all proper measures under the laws of Wisconsin for the protection of his interest, and I apprehend that it was not material whether the other beneficiaries did or did not join in such action. It may be very questionable, I think, whether the demand which it is claimed was made on Mr. Ogden in New York was of such a character as to require the performance of any affirmative action on the part of the defendant. The convertible land grant certificates, which were issued, declared that the holders of the bonds were entitled, on presentation of the certificates to a deed for a proportionate share of land in accordance with certain principles therein stated. It would seem that a more formal demand than that referred to in the testimony of Mr. Beecher was necessary in order to put the defendant in default on non-compliance with such demand. It certainly was more obligatory on the plaintiff's testator and the beneficiaries under the trust, to look after their interests in these lands and to guard against waste and trespasses, than on the defendant. Besides, the beneficiaries provided no fund out of which the defendant should be paid for any expenditures that might be incurred. But although this may be so, still I think there are certain facts which, it is claimed by the plaintiff, are established by the evidence,

which, if true, may entitle her to relief, independent of the view already stated by the court. It is said, and there is proof tending to show that to be the fact, that the defendant received a part of the proceeds of the sales of timber, and that some of the timber which was taken from the land thus held in trust, was used by the defendant. Wherever the proceeds of the timber, taken from the land, can be traced into the hands of the defendant, or wherever timber cut from the land has been used by the defendant, it ought to account to the equitable owners of the land; and so the plaintiff may be entitled to her share to that extent and no further.

An order may be made referring the matter to a master.

JONATHAN EDWARDS vs. HARDY WRAY *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—MAY, 1882.

1. MORTGAGES—MORTGAGEE IN POSSESSION UNDER PAROL AGREEMENT.—Even where there is a statutory provision that "unless a mortgage specifically provide that the mortgagee shall have possession of the mortgaged premises he shall not be entitled to the same," the parties can make a parol agreement to that effect, and if they do so and the mortgagee goes into possession under it, the rights of the parties are the same as if the giving of possession had been specifically provided for in the mortgage.

2. The rights of the mortgagee, in possession under such a parol agreement, to the mortgaged premises are not affected by an execution sale of such premises under a judgment the lien of which is subsequent to his possession.

3. EXECUTION SALE OF REAL ESTATE—RIGHT TO RENTS AND PROFITS DURING REDEMPTION PERIOD WHEN MORTGAGEE IS IN POSSESSION.—The statute of Indiana of March 31, 1879, relating to the redemption of real estate sold on execution or decree of sale, and providing that in case the same is not redeemed, the purchaser shall be entitled to recover from the parties in possession during the time the real estate is subject to redemption reasonable rents and profits therefor, does not apply to the case where a mortgagee has gone in possession prior to the lien of the judgment under which the sale is made, by agreement with the mortgagor, the judgment debtor.

Submitted on bill and answer.

Baker, Hord & Hendricks, for complainant.

Dailey & Pickerill, for defendant T. W. Hill.

GRESHAM, J.—This is a suit to foreclose a mortgage. In addition to the usual averments the complainant alleges that in September, 1879, and some time before the filing of his bill, by an agreement between the mortgagor and himself the

possession of the mortgaged premises was turned over to him and has been ever since retained by him. He sets out an itemized statement of the rents collected which have been applied towards the payment of the interest on his mortgage debt. His right to so apply a part of these rents is denied by the defendant T. Wiley Hill, who, in his answer, claims that he is entitled to all the rents that have accrued since the third day of July, 1880, at which time he bought the mortgaged premises on an execution sale made on a judgment junior to complainant's mortgage. This claim is based upon the provisions of section 1 of an act which went into effect March 31, 1879, relative to the redemption of real estate sold on execution or decree of sale. The section is as follows:

"Section 1. Be it enacted by the General Assembly of the state of Indiana, that, whenever any real estate or any interest therein shall be sold on execution, the sheriff or other officer making the sale shall issue to the purchaser a certificate of purchase. The certificate shall entitle the purchaser, his heirs, or assigns to a deed of conveyance, to be executed by the proper officer, at the expiration of the time allowed for redemption, unless the property sold shall have been previously redeemed. The owner of the property shall be entitled to the possession thereof during the time the same is subject to redemption; but if the same is not redeemed, he shall be liable to the purchaser, his heirs, or assigns for the reasonable rents, profits, or use thereof; *Provided*, if such owner is not the actual occupant of the premises sold, but the same be occupied by a tenant or other person, such tenant or other person shall be liable to the purchaser for the reasonable rent or use and occupation of the premises, and may be treated in all respects as the tenant of the purchaser, who shall, in case the property is redeemed, allow, as a payment

upon his judgment, the amount of the rent by him collected." Laws of Indiana, 1879, page 176.

Hill insists that under this section from the time he obtained his certificate of purchase the complainant became liable to him as the occupant of the property. In other words, his position is that the agreement between the mortgagor and the complainant, although made in good faith, must give way to the provisions of the statute.

The question, then, is, does the section of the statute quoted apply to the complainant's possession? It is admitted that the complainant is a mortgagee in possession with the consent of the mortgagor, and that aside from the statute under consideration he has a right to hold that possession and collect the rents on the property until his mortgage is paid. This is the rule at common law, even where the lien theory of mortgages obtains.[1]

In this state there is a statutory provision that "unless a mortgage specifically provide that the mortgagee shall have possession of the mortgaged premises he shall not be entitled to the same." The mortgage in suit did not contain such a provision. Notwitstanding this fact, the parties to this mortgage could enter into a parol agreement that the mortgagee should take possession of the mortgaged premises, and could carry out such an agreement by putting the mortgagee in possession. *Parker vs. Hubble*, 75 Ind. 580. This was in fact done in this case, and when this parol agreement was so executed by the surrender of possession on the part of the mortgagor the contract between the parties to the mortgage then stood as though it had been specifically provided in the mortgage that the mortgagee should be entitled to the possession of the mortgaged premises.

[1] *Russell vs. Ely*, 2 Black, 575; *Witherell vs. Wiberg*, 4 Sawy. 232; *Phyfe vs. Riley*, 15 Wend. 248; *Hennesy vs. Farrell*, 20 Wis. 42; *Dutton vs. Warschauer*, 21 Cal. 609; *Roberts vs. Sutherlin*, 4 Oregon, 219.

The redemption statute of 1879 was not intended to defeat or abrogate rights acquired under such a contract. Its effect was meant to be limited to sales of property which should be sold independently of any contract pertaining to its use or possession. Its purpose was to furnish a rule which should be applicable to sales of real estate, the dominion over which the judgment debtor or his assigns still held. It does not contemplate an interference with senior rights or equities created prior to the attaching of the judgment lien that is to be enforced by the sale. It relates to a remedy for the enforcement of judgments, and it does not and could not inhibit a contract relation that might curtail that remedy. It is true that this statute was in force when the agreement in question was made, but, no fraud being charged, the parties to that agreement had the right to enter into it, and the complainant is entitled to be protected in the rights thus secured notwithstanding the statute. *Edwards vs. Woodbury*, 1 McCrary, 429.

Whether this proposition would be true if the lien of the judgment had attached prior to the making of the arrangement between the mortgagor and the mortgagee, need not be decided. The pleadings show that the agreement under which the complainant went into possession of the mortgaged premises was made before the judgment under which Hill derives title became a lien on the real estate. When that lien came into existence it of necessity attached to real estate charged with the burden of the complainant's right of possession. It was a lien only on such an estate in the property in controversy as the judgment debtor at that time held, and the execution sale was made subject to any liens, pledges, or rights that he had fastened upon the real estate in favor of any other party. *Monticello Hydraulic Co. vs. Loughry*, 72 Ind. 562.

The complainant was in possession by his tenants, and this was notice of his rights.[1]

The rights of complainant in the mortgaged premises as mortgagee in possession were no more affected by the execution sale than were his rights under his mortgage. They alike remained intact. The same equitable principles that authorize the appointment of a receiver of mortgaged property may be invoked in this case to sustain the arrangement between the mortgagor and mortgagee by which the latter took possession of the premises. The mortgagor turned over the property to the mortgagee in order that the rents might be applied to the payment of interest, but it appears that the interest is greatly in default. It is to be presumed, therefore, that the mortgagor is insolvent or seriously embarrassed, and the premises are not an adequate security for the debt, and that these facts were considered by the parties when the arrangement was made. This court has uniformly held that under these circumstances a receiver should be appointed to protect the interests of the mortgagee. The arrangement made secured to the mortgagee without the aid of a court just what the court would have given him as against not only the mortgagor but as against all junior lienholders. The purposes of the parties to this agreement were of so equitable a character that they should be effectuated and not defeated.

The provisions of the redemption act of 1879 furnish no reason why the court should refuse the appointment of a receiver upon proper showing, and it is equally clear that an amicable arrangement between a mortgagor and mortgagee, which effected at once what a receivership would have indirectly accomplished, should be upheld, although it was made after the statute under consideration took effect.

[1] *Bank vs. Flagg*, 3 Barb. Ch. 317; *Wright vs. Wood*, 23 Pa. St. 120; *Franz vs. Orton*, 75 Ill. 100; *Dickey vs. Lyon*, 19 Iowa, 544; *O'Rourke vs. O'Connor*, 39 Cal. 442.

SARAH SOUTHWORTH vs. JANE N. ADAMS *et al.*

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—MAY, 1882.

IN EQUITY.

1. SECONDARY EVIDENCE ADMISSIBLE TO ESTABLISH LOST WILL—DECLARATIONS OF TESTATOR.—In a suit to establish a lost will secondary evidence of the existence and contents of the will is admissible; and the declarations of the testator concerning the will may be shown, as well to establish its contents, as to show the probability or improbability of its destruction by him.

2. CHARACTER OF EVIDENCE NECESSARY.—The burden is on a party setting up a lost will, to prove its execution and contents by strong, positive and convincing evidence.

3. LOST WILL—PRESUMPTION OF DESTRUCTION BY TESTATOR.—Where it is proved that a will was made, and the testator thereafter had custody of it, if it cannot be found after his death the presumption is that he destroyed it *animo cancellandi*, but such presumption is not conclusive and may be rebutted and overthrown by circumstantial proof.

4. EVIDENCE—WEIGHT OF TESTIMONY.—To justify a settled belief that the statements of a witness are willfully fabricated, the court should not rest its judgment upon possibilities, but there should be strong circumstances and tangible facts plainly pointing to such a conclusion.

5. The court after a full and exhaustive review of the extended facts and circumstances of this case, holds that the testator did not destroy his will *animo cancellandi*, but that it was accidentally lost from his possession shortly before his death, and should be established.

This was a suit in equity, brought originally in the State Court and duly removed to this court, to establish an alleged lost will of Richard De Forest, deceased. A statute of the state of Wisconsin, in force when the action was commenced, provided that "whenever any will of real or personal estate shall be lost or destroyed, by accident or design, the Circuit

Court shall have the same power to take proof of the execution and validity of such will, and to establish the same, as in the case of lost deeds;" and the action when commenced, was one authorized by this statutory provision, which, however, has since been somewhat changed.

In order to obtain a correct understanding of the situation of the deceased at the time of making the alleged will, and of the relations which during his life the parties in interest bore to the testator and to each other, reference to certain leading facts is necessary.

During most of the years of 1876 and 1877, Richard De Forest was a resident of Whitewater, Wisconsin. He had previously resided in Rochester, New York, where, in 1853, he contracted a second marriage. His wife at that time was the mother by a previous marriage, of two daughters, one of whom was then nearly seventeen years of age and is now the wife of Rev. E. Southworth, and is the complainant in this case. The other daughter at the time of her mother's marriage to Mr. De Forest, was nearly eleven years of age, and is the wife of the defendant, James M. Case. Mrs. Case was married in 1865, and Mrs. Southworth in 1866, and from 1853 to the time of their respective marriages, their home was with their mother and stepfather, in Rochester. At the time of his second marriage, Mr. De Forest had a daughter, Mrs. Jane N. Adams, then and now the wife of Walter E. Adams, and who is the sole heir at law of her father, and the principal defendant herein. Mr. and Mrs. Adams reside in Detroit, Michigan, and have long resided there. At the time of the death of Mr. De Forest, both Mrs. Southworth and Mrs. Case resided in Whitewater, Wisconsin. The property constituting the homestead of Mr. and Mrs. De Forest in Rochester was acquired and mostly paid for by Mr. De Forest at a cost including improvements, of about $5,000, and on its purchase he caused the title to be

taken in the name of his wife. Mrs. De Forest died in 1876, the Rochester home was then broken up, and thereafter, during most of the time until his death, which occurred November 20, 1877, he lived with his stepdaughter, Mrs. Case, at Whitewater. He had been in active life a clergyman, but was now retired from his profession and was shown to have been a man of reserved manners and of reticent habit in speech. After the death of his wife, he sold the Rochester homestead for $8,000, and the proceeds of the sale were divided between himself, Mrs. Southworth and Mrs. Case, each receiving one-third. In May, 1876, and after he had established a residence in Whitewater, he made a will, which, however, was subsequently destroyed and the contents of which were not disclosed by the proofs. The attorney who drew that will, testified that he thought he drew for Mr. De Forest a second will which was also afterwards destroyed. It was claimed in behalf of the complainant, that in June, 1877, Mr. De Forest made still another will of the following tenor and effect: "In the name of God, Amen: I, Richard De Forest, of the town and village of Whitewater, Walworth county and state of Wisconsin, and being of sound mind and memory, for which I thank His holy name, and being seventy-four years of age, do make, publish, and declare this my last will and testament in manner following, that is to say: First, it is my will that all of my just debts and funeral expenses should be paid as soon after my decease as may be. Second, I do hereby give and devise unto my daughter, Jane N. Adams, the interest on $3,000 for and during her life, and at her death I do hereby give and devise the same, said $3,000, to my two grandsons, Romain De Forest Adams and John P. Adams, to be divided equally between them share and share alike. Third, I do hereby give and devise unto my stepdaughter, Mrs. Ellen S. Case, wife of James M. Case, the sum of $300. Fourth, I do hereby give and devise unto

my stepdaughter, Mrs. Sarah Southworth, wife of Rev. E. Southworth, the sum of $300. Fifth, I do hereby give and devise unto my namesake, Charles De Forest Case, son of James M. and Ellen S. Case, the sum of $200 and my gold watch and chain. Sixth, I do hereby give and devise unto my namesake, Chester De Forest Southworth, son of Rev. E. and Sarah Southworth, the sum of three hundred dollars. Seventh, I do hereby give and devise unto my grandsons, Romain De Forest Adams and John P. Adams, the sum of four hundred dollars each. Eighth, I do hereby give and devise unto the American Bible Society of Astor Place, New York, the sum of five hundred dollars. Ninth, I do hereby give, devise and bequeath unto Mrs. Sarah Southworth, wife of Rev. E. Southworth, all the rest and residue of my property, that I may die seized or possessed of, both real and personal, and to her heirs and assigns forever. Tenth, I do hereby nominate and appoint James M. Case, of Whitewater, Wisconsin, the executor of this my last will and testament, hereby revoking all former wills by me made. In witness whereof, I have hereunto set my hand and seal this (some day in June) A. D. 1877.

RICHARD DE FOREST. [Seal.]

"The above instrument consisting of one sheet of legal cap paper, was, at the date thereof, signed, sealed, published and declared by the said Richard De Forest, as and for his last will and testament, in presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

"J. H. PAGE, Whitewater, Wisconsin.

"GEORGE S. MARSH, Whitewater, Wisconsin."

The opinion contains a further review of the testimony and facts in the case.

Page & Bishop and *James G. Jenkins*, for complainant.

Weeks & Steele and *W. M. Lillibridge*, for defendant Jane N. Adams.

DYER, J.—Upon the facts as developed by the proofs, several questions arise. First—Can secondary evidence be given of the contents of the alleged will? Secondly—If so, is the evidence of the execution, contents and existence of the will adequate? And thirdly—If the will is duly proven, since it was not found after the death of the testator, was it or not destroyed by him *animo revocandi?*

1. In this class of cases, it was at one time somewhat questioned whether secondary evidence of the existence and contents of a will is admissible, and whether the declarations of the testator concerning the will may be shown, to establish its contents and the probability or improbability of its destruction by him. It is now, however, fully settled, both in England and in this country, that such declarations are admissible, and that secondary evidence may be resorted to for the purpose stated: *Colvin vs. Fraser*, 2 Haggard's Ecclesiastical Reports, 266; *Sugden vs. Lord St. Leonards*, 17 English Reports, 453; *Weeks vs. McBeth*, 14 Alabama, 474; *Patterson vs. Hickey*, 32 Georgia, 156, and *Betts vs. Jackson*, 6 Wendell, 173.

2. Counsel for the defendant, Mrs. Adams, dispute the genuineness of the alleged will, or rather deny that adequate proof is made of its contents. The rule is well established, that the burden is on a party setting up a lost will, to prove its execution and contents by strong, positive and convincing evidence. *Newell vs. Homer*, 120 Massachusetts, 280. The execution and contents of the will in question are, in my opinion, satisfactorily proved. The attorney who drew the will and witnessed its execution, testified upon the subject

positively and circumstantially. Another witness of unquestioned character testified that at the time when the will is alleged to have been executed, he was called to the attorney's office to witness its execution; that Mr. De Forest duly executed it in his presence, and requested him to sign it as a witness, and that he put his signature thereto as such witness. It is true that the age of Mr. De Forest is stated in the copy of the will now produced, to have been seventy-four years, when, in fact, he was then seventy-five years old; and it is also true that the contents of the will are stated by the attorney, from memory; but notwithstanding the error in the statement of the testator's age and the necessary dependence upon recollection in giving the contents of the will, I cannot reasonably doubt, in the face of all the other facts and circumstances proven, that the will was executed, as claimed by the complainant. The attorney appears to have been aided in his recollection of its contents by reference to a form book containing the form of a will which he says he uniformly used in drawing wills similar in general form and character to this. Mr. De Forest subsequently exhibited the document, and as will fully appear when another branch of the case is considered, made declarations to the effect that it was his will. Before the will was drawn, he prepared a memorandum in pencil of the different bequests he desired to make, and it is shown that the will was drawn mainly under his dictation with the memorandum before him. This paper was found after his death, and as to amounts and names of legatees, corresponds with the copy of the will now produced, except that the memorandum makes no mention of a residuary bequest in favor of Mrs. Southworth. It is true that a copy of the will was made after the memorandum was found, but the fact of the existence of the memorandum strongly corroborates the claim that a will was drawn and executed; and as the will is simple in its provisions, and as the memory

of the attorney was aided by the memorandum in the handwriting of the deceased, and by such circumstances as are proven to have existed in connection with the transaction, it would seem not to have been very difficult for him to recall the essential parts of the instrument. In *Sugden vs. Lord St. Leonards*, *supra*, it was held that the contents of a lost will may be proved by the evidence of a single witness though interested, whose veracity and competency are unimpeached; and in that case, the principal testimony upon which a very complicated will was established, was that of one witness, who was a beneficiary under the will. Without discussing at length the testimony bearing on this question, I hold without hesitation, that the execution and contents of the alleged will are sufficiently proved, and I may add that I regard this the least difficult question of fact in the case.

3. The remaining and more serious question is, can the will, under the proofs in the case, be established as a lost instrument and be held operative as a continuing testamentary disposition, or must the conclusion be that it was destroyed by the testator *animo revocandi?* The problem here presented is one not free from serious difficulty, since the facts which support the opposing claims of the parties, stand in strong array against each other. The principle of law involved is a very simple one, namely: That where a will is proved to have been made, and the testator thereafter had the custody of it, if after his death, it cannot be found, the presumption is that he destroyed it *animo cancellandi.* The courts have differed somewhat in relation to the precise nature of this presumption. Whether, properly speaking, it be of law or of fact, it is well settled that the presumption is not conclusive but may be rebutted and overthrown.

In *Brown vs. Brown*, 8 Ellis and Blackburn, 886, Lord Campbell said, "after execution, the will was delivered to the testator, and it is never seen in any other custody. The

testator said he should take it to his bankers, but he never did so, and on his death, though it has been searched for, it has not been found. It must therefore be considered as destroyed, and I think the presumption is that the testator destroyed it. That is a reasonable presumption, as he had the last custody of it, and it is not forthcoming. Whether this is a presumption of fact, or a presumption of law, liable to be rebutted, is not material. These facts give rise to a presumption shifting the *onus* of proof. As early as 1754, in *Helyar vs. Helyar*, 1 Phil. Rep. Lee's Judgments, 472, we find a great judge, Sir George Lee, laying down these principles and acting on them, nor have they ever been doubted since. In *Welch vs. Phillips*, 1 Moore P. C. 299, another very great judge, the present Lord Wensleydale, lays down the principle that this is a presumption of fact to prevail unless rebutted, and the same doctrine is laid down in *Cutto vs. Gilbert*, 9 Moore, P. C. 131, by another great judge, Dr. Lushington, than whom no one has had more experience in such cases."

Crompton, J., in a concurring opinion, said: "The main question is whether the second will was destroyed by the testator *animo cancellandi*. The cases cited establish what the course of evidence is. Frequently a state of facts shifts the burthen of proof from one side to the other. For instance, in the case of a bill of exchange, the presumption is that the holder gave value for it till evidence may be given by the other side that shifts the *onus* and calls on him to prove value. Such cases are not presumptions of law which cannot be rebutted, but instances of the course of evidence shifting the burthen of proof."

In *Loxley vs. Jackson*, 3 Phil. 126, 2 Eccl. Reps. 375, it was held by Sir John Nicholl that "when a will is not found on the death of a testator, the presumption of law is that it has been destroyed by him."

In *Colvin vs. Fraser*, 2 Haggard's Ecclesiastical Reports, 266, S. C. 4 Eccl. Reps, 113, it was held as follows: "A will being executed in duplicate, one part of which was proved to have been in, and was never traced out of, the deceased's possession, and was not found at his death, the *prima facie* presumptions are: first, that the testator destroyed the part in his own possession; and second, (if the first is not repelled) that he intended thereby to revoke the duplicate not in his possession."

In the opinion in this case, which is very instructive, the learned judge says, page 325: "This presumption of fact, and this legal consequence, may be rebutted by satisfactory evidence, but the burthen of proof lies upon the party setting up the will, whether he sets it up by propounding a draft, a duplicate or a cancelled will, for whether the paper be found cancelled, or whether it be wholly removed and not found at all, still the first presumption, as to the person who did the act, is the same. The force of the presumption and the weight of the *onus* may be different, according to circumstances; but the court, in order to pronounce for a draft, or a duplicate, or a cancelled will, must be judicially convinced that the absence or cancellation of the paper once in and not traced out of the deceased's own possession, was not attributable to the deceased. This negative may be established by a strong combination of circumstances leading to a moral conviction that the deceased did not do the act; or it may be established by direct positive evidence in different ways, such as by proving the existence of the instrument after the testator's death, by proving that he himself destroyed it when of unsound mind, or by error, or under force *sine animo revocandi.* * * * All these presumptions, if they come to be analyzed, may be resolved into the reasonable probability of fact deduced from the ordinary practice of mankind and from sound reason. Persons in general, keep

their wills in places of safety, or as we here technically express it, 'among their papers of moment and concern.' They are instruments in their nature revocable; testamentary intention is ambulatory till death, and if the instrument be not found in the repositories of the testator where he had placed it, the common sense of the matter *prima facie* is that he, himself, destroyed it, meaning to revoke it."

In *Sugden vs. Lord St. Leonards*, 17 Moak's English Reports, 511, which is the leading modern will case in England, Cockburn, C. J., stated the principle in this form: "Where a will is shown to have been in the custody of a testator, and is not found at his death, the well known presumption arises that the will has been destroyed by the testator for the purpose of revoking it, but of course that presumption may be rebutted by the facts. Although *presumptio juris*, it is not *presumptio de jure*, and of course the presumption will be more or less strong, according to the character of the custody which the testator had over the will."

In the same case, Jessel, master of the rolls, said, page 523: "If you trace the will to the possession of the testator, and it is not forthcoming at his decease, and there is no evidence to show what has become of it, that raises a sufficient presumption of law that he destroyed it with the intention of revocation, but like all other presumptions of law, it may be rebutted by sufficient evidence."

In *Betts vs. Jackson*, 6 Wendell, 173, it was held by Chancellor Walworth, on full review of the English cases, that where a will was duly executed and in the custody of the testator for five years afterwards, and within ten months previous to his decease, but could not be found after his decease, that the legal presumption was that the testator had destroyed it *animo revocandi*.

In the case of *Idley vs. Bowen*, 11 Wendell, 227, it was held that "a will duly executed, destroyed in the life time of

the testator without his authority, may be established upon satisfactory evidence of its contents, and of its having been so destroyed; the presumption of law is, that a will proved to have had existence and not found at the death of the testator, was destroyed *animo revocandi*, but a party seeking to establish such will may repel such presumption and show that it was improperly destroyed." So in the case of *Holland vs. Ferris*, 2 Bradford, 334, it was said, "If a will proved to have been executed and to have been in the possession of the decedent cannot be traced to the custody of another, or cannot be found, the presumption of law is, that it has been destroyed *animo revocandi*." But in *Legare vs. Ashe*, 1 Bay, (S. C.) 464, the view of the court was, that the non-production of a will is only a *prima facie* presumption that it was cancelled and not a legal conclusion; and in *Durant vs. Ashmore*, 2 Rich. (S. C.) 192, the court use this language in the opinion: "The court below stated this general proposition, that where a testator had taken charge of his own will, and it could not be found among his papers after his death, the presumption of law was that he had voluntarily destroyed it for the purpose of revocation; that it was a mere presumption, however, and might be rebutted by circumstances going to show that the will had been destroyed after his death. That this in words was a little stronger than I think correct is true, but I have no doubt the judge really intended no more than the very position which I maintain. Still in a case like this, where the merest trifle may have produced the verdict, I think it necessary to qualify the proposition stated. That after the execution of a will has been duly proved it can only be destroyed by showing another will revoking it, or by expressly proving burning or cancellation, is plainly and very properly declared not to be law by *Colvin vs. Fraser*, 4 English Ecclesiastical Reports, 113; *Lillie vs. Lillie*, 5 Ecclesiastical Reports, 6, and the well considered judgment of

the Court of Errors of the state of New York, in the case of *Betts vs. Jackson*, 6 Wendell, 173, overruling the same case decided in the Supreme Court under the title of *Jackson vs. Betts*, 9 Cowen, 208. That a presumption of revocation arises from the fact that the will is not found, is beyond all doubt, and is fully sustained by the cases cited. But I maintain that this is not a presumption of law; it is a presumption of fact merely, and that, I have no doubt, was the idea of the judge below, although he called it a presumption of law, as is often done by the judges in the cases referred to; for he said it might be rebutted by facts showing the existence of the will. Judge WATTS struck the true idea in the case of *Legare vs. Ashe*, 1 Bay, 457, when he said, 'the non-production of it, (the will,) is only a *prima facie* presumption that it was cancelled, and not a legal conclusion.'"

In the matter of *Johnson's Will*, 40 Connecticut, 588, it was said: "The mere absence of the will raises a presumption that it was revoked. Whether that presumption is one of law or of fact, is perhaps immaterial, as in either case, it must be rebutted by proof. Evidence for that purpose may be direct or circumstantial." See also as asserting the same rule: *Davis vs. Sigourney*, 8 Metcalf, 487; *Newell vs. Homer*, 120 Massachusetts, 280; *Appling vs. Eades*, 1 Grattan, 292; *Weeks vs. McBeth*, 14 Alabama, 474; *McBeth vs. McBeth*, 11 Alabama, N. S. 596, and *Dawson vs. Elizabeth Smith's Will*, 3 Houston's Del. Reports, 335. In *Minckler vs. Minckler*, 14 Vermont, 125, Judge REDFIELD held, that if a testator executes his will and the will is not to be found at the time of his decease, this raises a presumption of his having destroyed it with intent to revoke it. But this is a presumption of fact merely which may be encountered by contrary proof and the will thus established.

Whether, therefore, the presumption in such a case be one

of law or of fact, it is fully settled by both the English and American authorities on the subject, that the presumption may be rebutted by proof on the part of the proponents of the will, upon whom the burden rests to show that the will was not destroyed by the testator with an intention to revoke it, so that in the end it really becomes a question of fact for the court or the jury to determine, and in the determination of the question, the whole evidence must be looked into.

Recurring, then, to the facts, which are of singular interest, it may be again remarked that the will in question was made in June, 1877. The testator died on the 20th day of November of the same year, under circumstances which will be hereafter stated. After the will was finished in all details of execution, the attorney placed it in an unsealed envelope, which he labelled, "Last will and testament of Richard De Forest," and delivered it to the testator, who then left the attorney's office, taking the will with him. There cannot be much doubt that he took the will to the house of Mr. and Mrs. Case, which was his home. It appears that when he came there to live in April, 1876, he brought with him two trunks, one of which is described as a leather-covered trunk, and the other as a black trunk. The leather-covered trunk was kept in the store-room of the house, and usually contained articles of clothing that he did not use and some of his books. The black trunk was kept in his sleeping room, and generally contained clothing, books, papers and such other articles as he did not keep in a bureau, of which he had the use, or in other parts of the room. He had also a small tin trunk, in which he kept what he regarded his most valuable papers, and this tin trunk was sometimes kept in a locked drawer of the bureau, and sometimes in the black trunk. Whether he placed the will, immediately after its execution, in the tin trunk, or in the black trunk, or in the bureau

drawer, if he deposited it in either of those places, is not known. It does not clearly appear that he immediately communicated to Mrs. Case, or any of her household, the fact that he had made a will, but the existence and his continued possession of the will to a time as late as October is satisfactorily proved. The witness Leland, who is a physician in Whitewater, testifies that in June, 1877, Mr. De Forest came into his office to pay a bill, and there remarked, in substance, that he had been to a lawyer's office "with reference to his will." In view of the nature of the remark, and the time when the witness fixes the occurrence—between June 1 and 15—it is quite apparent that the remark was made immediately or very soon after the will was drawn. The witness Fay testifies that in the course of a street conversation, Mr. De Forest said to him, in substance, this: "Your father is remarkably healthy for a man of his age. I almost wished I had fixed my property as your father has his; that is, so that when I die that will be the end of it; it will all be closed; but I have made provisions for Mrs. Southworth. She has been unfortunate, for she has married a minister; and you know they are always poor. My daughter has had as much or more than I can give the rest of them."

Mr. Page, the attorney who drew the will, testifies that about two or three months after the will was drawn, Mr. De Forest called at his office and inquired about a proper place to deposit a will, and witness told him that "some people sent wills to the county judge for him to keep for them and some left them with the attorney who drew the will; and some delivered them to the executor named in the will," and he thinks he also told him that some persons left their wills with a friend. At this time, Mr. Page swears that Mr. De Forest took the will out of his pocket and put it back there at the close of the interview; that he did not then see

the will itself, but saw the envelope and noticed the filing thereon.

Mrs. Ellen S. Case testifies that he occasionally looked over his papers; that she has seen him take them from the tin trunk for that purpose; that at one time he exhibited to her his will in the presence of her husband and that she read it, but she is unable to fix the time or to say whether or not the tin trunk was present on that occasion. Mr. Case states that in May, 1876, Mr. De Forest handed to Mrs. Case a will and told her to read it. If this be so, the will then shown must have been the instrument which Page swears he first drew, and which was afterwards destroyed. Mr. Case then further states that in June, 1877, he saw a paper purporting to be the will of Mr. De Forest. His testimony in that connection, is as follows: "My wife was present and took the will from the hands of Father De Forest. She read the will at his request; he asked her how she liked it. I think she told him if he was suited with it, she was. He said it just suited him and he never should change it again. He asked me what I thought about it; I heard it read—heard my wife read it. I told him I thought he might have bettered it in one place, and that was by selecting a better man for executor. He says you will do as well as you can, won't you? I told him I would. He said that was all any one could do. I think that was all that was said at the time about the will." The witness testifies further, that he thinks Mr. De Forest took the will at that time from his coat pocket, and that he also thinks that after it had been read, it was placed in the tin trunk, but of this he evidently is not certain. Mr. Case also testifies that in October, 1877, as near as he can recollect, he saw Mr. De Forest in the sitting-room of the house with the tin trunk in his lap looking over his papers; that he then saw the will and the envelope in the hands of Mr. De Forest, the will being out of the envelope, but he does not

know what was done with the will, nor did he ever see it afterwards.

Mr. De Forest left Whitewater on the 20th day of November, 1877. A short time before that, he announced to the family of Mr. Case and to some other friends, his intention to go to Brooklyn, New York, stating in substance, as a reason for leaving, that the winter climate in Wisconsin was too rigorous for him.

Shortly before his departure his black trunk was packed by Mrs. Southworth and Mrs. Case. The articles placed in the trunk included his clothing, books, papers, sermons, a satchel, and the small tin trunk, which was locked. The testimony does not clearly show whether the articles packed in the trunk comprised all of his effects or not, but the trunk was full, and the small tin trunk was placed at the bottom, so that the other contents of the trunk were over it. The testimony is, that Mr. De Forest remarked at the time, in the presence of Mrs. Southworth and Mrs. Case, that he wished to have the tin trunk packed carefully, as he had important papers in it. It is also proved that after the large trunk was made ready for removal to the depot, it was securely locked and strapped. On the morning of November 20, a teamster, by the name of Chadderdon, took Mr. De Forest, Mr. Case and the trunk to the depot. As Mr. De Forest intended to stop at Detroit, where his daughter resided, he purchased a ticket to New York via the Michigan Central railroad, but his trunk was checked, probably by mistake, over the Lake Shore & Michigan Southern road. The mistake, however, if it was such, was not then noticed, and he took the check. As the trains ran at that time, Mr. De Forest arrived in Milwaukee at 11 o'clock, A. M., of November 20, and left for Chicago at 1 o'clock, P. M., arriving in that city at 4 o'clock, and there is proof that his trunk accompanied him on those trains. On arrival in Chicago, the trunk was taken to the road over

which it was checked, and Mr. De Forest proceeded to the house of W. H. Ovington, whose wife was a sister of Mrs. De Forest, deceased, and there he expected to spend the night, and to resume his journey on the following morning. On reaching the house he almost instantly died. On his person were found certificates of stock and indebtedness, of the West Division railway of Chicago, amounting in value to several thousand dollars, two portemonnaies and a purse containing about $150 in money, a letter of dismissal and recommendation from the Congregational church of Whitewater to a Congregational church in Brooklyn, a photograph of his deceased wife, his railroad tickets and in one of his portemonnaies were his trunk check and key, and also a key of the small tin trunk. He had brought with him, in addition, a satchel which contained articles of clothing, but his will was neither on his person nor in the satchel. Mr. Case was immediately notified of the death of Mr. De Forest, and he and his wife arrived in Chicago on the morning of the 21st. On that day Mr. Case informed Mr. and Mrs. Adams by telegraph of the death of Mr. De Forest, stating that he should leave for Rochester with the body on Thursday, the 22d, via the Michigan Central railroad, and asked the Adamses to accompany him to Rochester to attend the burial services. On the evening of the 22d Mr. Case left Chicago with the body of the deceased, and on the following morning met Mr. and Mrs. Adams on the train at or near Detroit, and they proceeded together to Rochester to attend the burial, which occurred on Saturday, November 24. Mr. and Mrs. Adams returned to Detroit, and Mr. Case returned to Chicago at about the same time. Meantime, Ovington, by dispatch to the baggage agent at Buffalo, had intercepted the trunk at that place, and it was immediately returned to him, and was in his possession on the arrival of Case from Rochester. The trunk was found to be strapped, apparently as when it

left Whitewater, but the hasp of the lock was broken or severed from the top of the trunk. The contents were in some disorder, but, according to the testimony of the witnesses Ovington and Blodgett, not more so than the handling of the trunk while in transit would occasion. The small tin trunk was in its place at the bottom of the large trunk, securely locked. It was opened and found to contain various papers, including the envelope in which the will was originally placed by the attorney Page, with the filing thereon, "Last will and testament of Richard De Forest," but the will was not in the envelope, nor was it found either in the tin trunk or in the large trunk. The witness Ovington testified that some loose papers were lying in the large trunk near the place where the tin trunk stood, and it appears that the memorandum before referred to in Mr. De Forest's handwriting, which was used by him when the will was drawn, was found among these papers after the return of the trunk to Whitewater. The body of the deceased was soon afterward exhumed, and further examination of the clothing made, but the will was not found, and, after prolonged search in all places where it has been thought possible to find it, it has never been discovered.

From all the testimony, it is quite apparent that the last time the will was ever seen by any person other than Mr. De Forest was in October, 1877, about a month before he died, when, Mr. Case testifies, the deceased was looking over his papers and had the will in his hand.

The question now is: Must the presumption that the testator destroyed the will be held to prevail, or is that presumption overcome by the proven facts and circumstances of the case? It can hardly be questioned, I think, that Mr. De Forest, by his outward acts, manifested a strong desire to make a testamentary disposition of his property, and not to die intestate. The very specific designation of the bequests he wished to

make, as shown in the memorandum prepared by himself, and which really constituted the basis of the will as finally drawn, the personal directions he gave, and care he exercised when the will was put in form, his previous execution of a will, which he now wished to change, his subsequent declarations that the will drawn in June, 1877, suited him, and that he should never change it, his evident desire to provide for Mrs. Southworth as evidenced by his remark to the witness Fay, his inquiries in relation to a place where the will might be properly deposited for safe keeping, made several months after the will was drawn, are all circumstances which point to a well matured intention to make a final testamentary disposition of his property.

There is no proof of any expressions by him of dissatisfaction with the will subsequent to the time when he declared that he should never change it. And in view of all the circumstances existing, both before and after the death of his wife, it is not difficult to believe that he naturally desired, in the final distribution of his estate, to bestow it in the manner expressed in the will. He certainly intended at the time he executed the will, thus to dispose of his property, and there is no affirmative evidence that he afterward changed his mind. He was an old man. He knew that he had not many years of life before him. It is quite evident that he had been devotedly attached to his wife. Her children had grown to womanhood under his parental care, and it was most natural that he should be drawn to them by ties of strong affection, especially after the death of their mother, while at the same time his affection for his own daughter and her offspring suffered no abatement.

It was argued by the learned counsel for the defendant, Mrs Adams, that Mr. De Forest's departure from Whitewater was probably occasioned by family disagreements, which were hidden from public view and have never been revealed.

There is no testimony that lends support to even a conjecture of that character. There is no proof whatever that furnishes ground for even a suspicion of any severance of the domestic connection between the deceased and either of his step-daughters or their families. It is in proof that he cherished both for Mrs. Southworth and Mrs. Case the kindliest feelings, spoke of them in affectionate terms as if they were his own children and of his home with them as one of comfort, and it is also shown that this feeling was reciprocated by them, and that they uniformly addressed him as if he were their own father. One of the witnesses testifies that Mr. De Forest often spoke of Mrs. Southworth in connection with Mrs. Case. He said: "They were like his own children to him; they had done for him what no one else could do but their mother. In speaking of his home being broken up and being left alone, it was the greatest comfort he could have was a home with them, that they had done everything for him and seemed as willing to do for him as though he were their own father."

It is at the same time apparent that Mr. De Forest's parental affection and regard for his own daughter, Mrs. Adams, was steadily maintained. There is some testimony which indicates that there had once been business relations between Mr. De Forest and Mr. Adams, which involved the former in some pecuniary losses and which were therefore unsatisfactory, and there appears to be some ground for the belief that his feelings towards his son-in-law were not those of entire confidence and satisfaction. It is shown however, that on one or more occasions Mrs. Adams was the recipient of presents from her father, and it appears that in August, 1876, he went from Whitewater to Detroit to attend the marriage of one of his grandsons, and at that time procured his life to be insured in the sum of $2,000 for the benefit of Mrs. Adams, who, it is understood, received the avails of the insurance

after her father's death. The witness to whose testimony reference has just been made, further testifies to a conversation she had with Mr. De Forest a short time before he went to the wedding of his grandson, in which he said that he had "spared no money in educating his daughter; that he had done a great deal for her in many ways, but that she would never be able to do anything for him," that "on account of his grandson he should go to the wedding, although it was no comfort for him to go there." The attorney who drew the will also testifies that Mr. De Forest directed him to omit the name of Mr. Adams from the will, but to insert the names of Mr. Case and Mr. Southworth as the respective husbands of the legatees Mrs. Case and Mrs. Southworth, and it is observable that in the pencil memorandum in the testator's handwriting before referred to, the name of Mr. Adams does not appear, and that the names of Mr. Case and Mr. Southworth are written therein in conjunction with the names of their wives. Too much stress however is not to be laid on this circumstance, for the reason that Mrs. Adams is mentioned in the memorandum as his daughter, and he may not, therefore have thought it necessary to insert therein the name of her husband for further description; and as Mrs. Case and Mrs. Southworth were not of blood kin to him, he may have deemed it important to name their husbands in that connection for the purpose of full identification.

In support of the claim that Mr. De Forest's departure from Whitewater was occasioned by family dissensions, it is urged that his whole conduct indicated an intention not to return. The testimony does not support this conclusion. On the contrary the weight of the evidence is that he left only because of the severity of the winter climate in Wisconsin. Allusions that, from time to time he made to his health, very clearly show this to have been the fact. On one

occasion he remarked that he was going east on a visit; at another time he said he should remain away until spring, and on other occasions he said nothing of the length of time he should be absent. In September previous he stated to a friend in Chicago that he should not stay in Whitewater long, the winters were too severe for him. To another witness he remarked that "he was going east on account of his neuralgia; that if he was not better there he should return. Mr. Case made it very pleasant for him here, but that on account of the severe weather it made his trouble worse," and in a conversation with Rev. G. W. Wells, in relation to his proposed departure, he said that he had settled matters for this life and the life to come.

It is contended further on the part of the defense that there is affirmative proof that a few days before the deceased left Whitewater he destroyed the will. In support of this theory, the testimony of Mrs. Lucinda Case, the mother of James M. Case, is relied on. She was an aged lady, whose home was with her son, and she testified that on the Friday before Mr. De Forest went away, which was November 16, he was writing at a desk in her son's room, that she was sitting in the kitchen where there had been a fire; that "he came in after he got through writing, and he had a paper in his hand. He took off the cover to the kitchen stove. * * * He had a paper in his hand that he twisted around; he poked up the coals and put it on the coals and put the cover on." She described the paper burned as white writing paper, "twisted around the middle and the ends stuck out," and says that when he burned the paper he said nothing and at once went out of the room. From the circumstances under which this act was done, especially when considered in connection with the fact that he was already preparing to go away, it is strongly contended that the paper Mr. De Forest then burned was the will in

question. I do not think this conclusion is maintainable upon the testimony. In the first place it seems highly improbable that he would thus destroy the will in the presence of an inmate of the house. So far as the proofs show, he had given no signs of an intention to revoke or destroy it, and if he had secretly resolved to destroy it, it would have been natural for him to make the act of destruction as secret as the thought which prompted the act. But it appears, further, that on the day when he burned the paper (Nov. 16) he wrote a note in pencil to Mr. and Mrs. Adams, stating that he hoped to arrive at their house on the 21st inst.; that he was as well as usual, except that he was troubled with a tremor which he thought was owing to the climate; that he wished to leave "this section of the country" as soon as he could, and designed to go East and would stop over one day with them to rest. In this connection the complainant has introduced evidence tending to show that he at first attempted to write the letter to the Adamses with a pen, but that the tremor of his hand was such that he could not use a pen and that he finally wrote the letter with a pencil. It is further shown that the deceased was a man of orderly habits and that it was his custom to destroy waste papers by burning them, and it is claimed upon proof of all the circumstances, that the paper he burned on the occasion referred to, was undoubtedly that upon which he had attempted to write the letter to the Adamses with a pen. Moreover, the attorney who drew the will testifies that it was drawn on a sheet of legal cap parchment paper, of a yellow tinge and longer and wider than ordinary legal cap paper, and if this be so, it is quite clear that the paper which Mrs. Case saw the deceased destroy, does not answer the description of that on which the will was drawn. Giving due weight to all the proof we have on this question, it is in my judgment inadequate to establish

the claim that the deceased then destroyed the will. In the light of all the circumstances it seems much more probable that the paper he burned was that which he had attempted to use in writing to Mr. and Mrs. Adams. This being the conclusion of the court, it must be held that there is no affirmative proof in the case that the testator destroyed the will. At the same time it is to be observed that there is no evidence of its destruction by any other person whose interests were adverse to the will. Mr. and Mrs. Adams did not see Mr. De Forest after he made the will, until his death; they had no access to his papers or trunks at any time when the will could have been abstracted therefrom, nor do they appear to have known that he had made the will now sought to be established, until they learned it from Mr. Case when on their way to Rochester to attend the burial; and at that time they seemed to have supposed that the will then spoken of was that which Mr. De Forest had made in 1876. This I think is a fair inference from the testimony.

On the whole, looking at this case in all its aspects and in the light of all the circumstances that surround it, I am constrained to believe that the will was at some time after it was last seen in October 1877, accidentally lost from the custody of the testator. Undoubtedly many wills once deliberately executed, are afterwards secretly destroyed by the persons who made them; but the circumstances here are such that they seem strongly inconsistent with the theory that such was the fact in this case. The envelope in which the will was originally placed and the memorandum made by the testator himself from which the will was drawn, were preserved, and were found in the place where it was most natural to look for the will. It certainly seems very improbable that the deceased would secretly destroy the will and at the same time preserve the envelope and the memorandum. These papers must have been deposited by him in

the place where they were found, and it is reasonable I think, in the light of all the circumstances, to believe that he supposed the will was there also.

As is apparent from the statement of the facts heretofore made, Mr. De Forest on more than one occasion carried the will in his pocket and was seen to have it in his hand out of the envelope, from which it is not unreasonable to infer that the will may, at one of these times, have been mislaid and lost, while he may have supposed that it was in the envelope and securely deposited in the tin trunk. Moreover, I have not been able to resist the belief that it was not impossible for the loss to have occurred during the various examinations of the trunk after its return to Chicago, though I must admit that this can hardly be said to be more than a possibility.

It is proven that at the time the trunk of the deceased was being packed and when he remarked that he wished to have the tin trunk packed carefully as he had important papers in it Mrs. Southworth said to him that she supposed the will was in that trunk, and that he made no reply. From his silence when thus addressed, it is argued that the inference is, that the will had been destroyed. But this does not follow. He may not have cared to make any reply. He may have chosen to evade a reply. For a man of his character and temperament, his silence may have been entirely natural. He may have thought it unnecessary to make any reply, as he had just remarked that the trunk contained important papers. In other words this silence may have been just as consistent with the continued existence of the will as with any other theory. Moreover the evidence is that he was so deaf that he sometimes used an ear trumpet, and he may not have heard Mrs. Southworth's remark, although she states that he could hear some persons very much better than he could others, and that he always said that he could hear her very

readily. Nevertheless, it is not at all improbable that he did not then hear what she said.

The testimony of the witness Chadderdon, the teamster who carried Mr. De Forest and his trunk to the railroad depot in Whitewater, if true, fully sustains the theory that the deceased supposed his will was in existence on the very day he died. Speaking of what transpired at the depot, he testifies as follows: "After we had set down the trunk, he"—meaning Mr. De Forest—"walked up where they checked the trunks. Directly he returned to me and I said to him 'Father De Forest I am sorry to have you go away.' He said it wouldn't be for long, if nothing happened he should be back in the spring, and I then said to him, 'I am sorry to see you go away alone; you are a pretty old man to travel alone.' He answered that he was used to traveling alone, and it didn't matter, he said, where he fell. He said, 'I have my business all settled, and I have my will here with me in the trunk.' Our conversation then was broken off, the train arrived." The proof is that no one was present at this conversation, if it occurred, except Mr. De Forest and the teamster.

This testimony is severely attacked, as stating not only an improbable, but a corruptly manufactured story. After such a lapse of time, there should of course, be taken into account, in considering the testimony, the liability of the witness to be mistaken in his recollection of just what was said, and the possibility that from the infirmities of memory he may now be unable to state the conversation with accuracy. But I do not think the claim that his testimony is a corrupt fabrication, is established by the evidence. To justify a settled belief that the statements of the witness are wilfully fabricated, the court should not rest its judgment upon possibilities. It should have strong circumstances and tangible facts plainly pointing to such a conclusion. As to

the question of the credit to be attached to this testimony upon the theory that it is honestly given, but that it may still be inaccurate and unreliable, and therefore of doubtful value, I do not deem it necessary to discuss it, since I am of the opinion that treating the testimony of this witness as only in a limited degree corroborative, the conclusions of the court upon the merits of the case must be as already indicated.

It has been argued that it was unnatural for the deceased to make a will diverting the larger portion of his estate from his sole heir at law, and she his daughter. Nevertheless, that he made such a will, cannot in the face of the evidence be reasonably denied; and in view of his relations to the various legatees in the will and of the circumstances of his situation in the last years of his life, and of all the facts, I do not deem the will so devoid of reasonableness as the counsel for the defendant claim it to be. By the will he remembered all persons bound to him by ties of kinship or affection. He disinherited none. His estate at the time of his death, as I conclude from the testimony, amounted to about $9,000, although in consequence of subsequent appreciation in value, it may now amount to $12,000 or more. He gave to Mrs. Adams by the will the use of $3,000 for life, and took care that at her death her children shall have the principal of that bequest. Then he gave to them $800 more. In considering the question of the reasonableness of the will, it is also to be borne in mind that he had secured to Mrs. Adams $2,000 in the shape of insurance on his life. Then he gave to Mrs. Case and her son only about $600, and after giving to Mrs. Southworth's son $300 and to the Bible Society $500, he bequeathed the residue to Mrs. Southworth, evidently because he considered her in greater need of such a provision than were the other recipients of his bounty. Looking at this will, as nearly as we may from

the standpoint he occupied when he made it, taking into consideration, as we must, the relations in which he stood toward all upon whom he wished to bestow his estate, it can hardly be maintained that the will is repugnant to such a sense of justice as a person in his circumstances might well be supposed to naturally feel and act upon.

In view of all the considerations stated, it is the opinion of the court that a decree should be entered declaring that the deceased died testate, and establishing the will.

THE FAVORITE.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—MAY, 1882.

1. ADMIRALTY—LIMITATION OF LIABILITY UNDER RULES, 54, 55, 56, AND 57—STIPULATION—INTEREST AND COSTS ALLOWED WHEN LIABILITY CONTESTED.—If the owners of a vessel apply to the court under Rules 54, 55, 56 and 57 in admiralty for the limitation of their liability as such owners, for damages occasioned by a collision in which such vessel took part, and the vessel is appraised, and a stipulation with approved sureties is given for the payment into court of the appraised sum whenever the court should so direct, the owners retaining possession of the vessel; and such owners then go on and contest their personal liability and the liability of their vessel for such collision, if it is decided that they are liable, and the amount of the allowed claims against the vessel exceeds the amount mentioned in the stipulation, the owners will be liable for interest on such sum, and the costs of the libellants in addition to the sum mentioned in the stipulation.

2. SURETIES NOT LIABLE FOR INTEREST AND COSTS.—But such liability for interest and costs will not be extended to the sureties in the stipulation, unless expressly mentioned therein.

The facts in this case were as follows:

On the 2d of August, 1877, a collision occurred upon the waters of Lake Michigan, between the steam propeller Favorite and the schooner Grace A. Channon by which the schooner and her cargo of coal were sunk, and became a total loss. On the 16th of the same month a libel was filed in this court, by the owners of the Channon against the Favorite, charging the collision to have occurred through the negligence of those in charge of the steamer, and claiming to recover as damages the value of the schooner and her freight. A further libel was subsequently filed by Graham to recover damages for the death of a child who was a passenger on the schooner, and was drowned by reason of the collision; and the Providence Washington Insurance Company which had insured the cargo of the schooner, and paid the loss which accrued under their policy, also filed a libel for the amount so paid.

After the filing of the libel by the owners of the schooner, and the arrest of the steamer, the Kirby Carpenter Lumber Company, which was the sole owner of the steamer at the time of the collision, applied to this court under admiralty rules 54, 55, 56 and 57, for a limitation of its liability as such owner for damages occasioned by such collision, to the value of the steamer and her freight then pending, and such steps were taken that the value of the steamer, her machinery, boats, tackle, apparel and furniture (there being no freight pending), was appraised and fixed at $12,397.80, and her owners by stipulation with approved sureties, agreed to make payment of that sum into court whenever ordered, and the steamer was thereupon released from arrest and delivered to her owners. Upon hearing on pleadings and proofs of the libels for damages, the court found the steamer in fault, and directed a reference to a commissioner

to take proof and report the damages sustained by the respective libellants.

The commissioner reported that he found that the value of the schooner at the time she was sunk by the collision was $15,000.00
That her freight then pending amounted to $277.50, for which she should be allowed one-half 138.75
Damages in the Graham suit from death of child .. 1,000.00
Damages to Providence Washington Ins. Co., insurance of cargo 2,500.00

Making a total of damages sustained by the several libellants $18,638.75

By this report the commissioner found that the several libellants were entitled to share *pro rata* in the amount fixed as the value of the steamer at the time of the collision; and he also found that the Kirby Carpenter Company having appeared as claimant in these several suits and contested its liability and the liability of the steamer for such collision, was liable for not only the amount called for by the stipulation as the value of the steamer, but also for interest upon the same at the rate of six per cent. per annum from the date of the collision, together with the costs incurred by the several libellants in their respective suits.

Exceptions were filed to so much of the report as charged the respondent with interest and costs, the respondent, the Kirby Carpenter Company, insisting that the amount called for by the stipulation, which was the appraised value of its interest in the steamer at the time of the collision, constituted the full measure of its liability, and that it was not liable beyond that sum for interest and costs, or either.

Gardner & Schuyler, for libellants.

John C. Richberg, for respondent.

BLODGETT, J.—The only question to be considered under these exceptions, is as to the correctness of the commissioner's findings in regard to the respondent's liability for interest and costs.

By the 54th rule in admiralty it is provided that "said court having caused due appraisement to be had of the amount or value of the interest of said owner or owners respectively, in such ship or vessel, and her freight for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sureties for payment thereof into court, whenever the same shall be ordered; or if the said owner or owners shall so elect, the said court shall, without such appraisement, make an order for the transfer by him or them, of his or their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of said act; and upon compliance with such order, the court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before the court, and make due proof of their respective claims."

It will be seen that under this rule the court may require the appraised value of the owner's interest in the vessel to be paid into court to await distribution to the several claimants, or allow the owner to retain possession of the vessel, free of liens and charges, in the premises, on his giving stipulation with sureties for the payment of the appraised value into court whenever ordered. In this case the owners were allowed to retain the steamer on filing a stipulation, as called for by the rule. The practical effect of doing this is to give the owners the use of the appraised value of the steamer until ordered to pay into court. If the respondent had paid the value of the steamer into court, the court could, and doubtless would, have ordered the money to be put at interest for the benefit of the parties concerned pending the litiga-

tion. But the respondents, evidently preferring to have the use of the steamer, thereby using the money at which she was appraised instead of paying the money into court or conveying the vessel to a trustee, elected to give a stipulation with sureties. It then contested not only its own personal liability, but that of the steamer, to the respective libellants for the consequences of this collision, and insisted that the collision occurred through the fault of the schooner and not from the fault of the steamer, and after forcing the libellants to an expensive and protracted litigation to establish their claims, says it is not liable beyond the amount called for by the stipulation; that it is not liable for interest, and the costs must come out of the fund.

It seems to me, a bare statement of the proposition is sufficient to show its injustice and unfairness.

By coming into court and seeking to have its liability limited to the value of the steamer, there would seem to be at least an implied admission that the applicant was liable for the consequences of this collision, and needed the benefit of the statute in that regard; and it might, perhaps, be urged that the owner could not, after such proceedings, be heard to deny its liability to the extent of the appraised value of the steamer. But the Supreme Court having held that even after a decree finding the ship libelled at fault, the owner may apply for and have the benefit of this statute, it would seem that the owner has the reserved right to require the persons claiming damages to establish their case by proof; but it cannot, I think, have been the intention, either of Congress in framing the statute, or of the Supreme Court by its rules, that the ship owner after having had the extent of his liability limited and defined by proceedings under the statute, can enter the arena of litigation, and contest the question whether he is liable at all or not at the expense of a fund in which he has no longer any interest, which he has

paid or agreed to pay into court as a condition for his discharge from further liability. To allow him to do so would be to put a premium upon the law's delay, and give the ship owner the right to vex claimants for the fund which he has cited them into court to claim without risk of cost to himself.

The practice under this statute has been so limited in this country, that but few adjudged cases are reported, and I do not find any direct adjudication on this point in our courts, although the plain intimation by the Supreme Court in the case of *The "Wanata,"* 5 Otto, 600, is that the owners of the offending vessel are liable for costs and interest.

Our statute is taken substantially from the English act of George III, and under that statute the English Court of Admiralty has always allowed costs, and, in a large number of cases, interest.[1]

In this case the stipulation does not, in terms, require the stipulators and sureties to pay interest, and undoubtedly the liability of the sureties cannot be extended to the payment of interest, unless it be for delay after the court has ordered payment; but I am so fully impressed with the obvious justice of the commissioner's findings, that I shall overrule the exceptions to the report, and order that the stipulators or their sureties pay into court the sum of $12,397.80 mentioned in their stipulation, within twenty days from this date, and that the respondent, the Kirby Carpenter Co., also pay into court within said time the interest on the said sum of $12,397.80, from the date of the stipulation to the present time, and that costs be awarded against the respondent in each of the suits, to be taxed by the clerk.

[1] *The Dundee*, 2 Haggard's Admiralty Reports, 137; *The John Dunn*, 2 Wm. Rob. 160; *The Valiant*, 1 Wm. Rob. 390; *The Amalia*, 34 Law Jour. 21; *The Northumbria*, 39 Law Jour. 3; *Smith vs. Kirby*, Law Reports, Q. B. Div. Vol. 1, 131.

THE BOARD OF DIRECTORS OF THE CHICAGO THEOLOGICAL SEMINARY vs. ASAHEL GAGE.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MAY, 1882.

IN EQUITY.

TAX TITLES—JUDGMENT CONCLUSIVE AS TO VALIDITY OF TAXES.—A judgment for taxes rendered by the proper court, when it is attacked collaterally, is conclusive as to the validity of the taxes; and the owner of lands who has allowed judgment for taxes to go by default, cannot afterwards in a suit to set aside the tax sale, be heard to allege that a portion of the taxes for which judgment was rendered were illegal and invalid.

This bill was filed April 22, 1880, to set aside a tax sale as a cloud upon complainant's title. The bill alleged that complainant was the owner in fee of certain lots in Chicago described in the bill; that in 1874, state, county and other taxes to the amount of $56 were assessed on the lots in question, and on September 24, 1875, at a tax sale by the treasurer of Cook county, the lots were forfeited to the state for the amount of taxes and costs; that in the year 1875, state, county, city and other taxes were assessed on the lots to the amount of $117.19; that a large proportion of such levy was illegal, being for items of expenditure by the city of Chicago, for the payment of which the city had no right to appropriate money, and levy taxes for the payment of the same, and that the amount of taxes for which the lots were forfeited to the state in 1875, was also extended against them in 1875, with the taxes of the latter year, and that at the tax sale for 1875, the lots were again forfeited to the

state; that in 1876, the lots were assessed for the taxes of that year, and the taxes of 1874 and 1875 for which the lots had been forfeited the preceding year, were added to the levy of the latter year; that judgment was entered against the lots for the taxes of 1876, and the back taxes of 1874 and 1875, and on the 20th of September, 1877, the lots were sold for such taxes and costs, which amounted to $442.61, and defendant, Asahel Gage, became the purchaser; that the time for redemption had expired, but the purchaser had taken out no deed, but was threatening to do so.

Wherefore, complainant claimed that the sale was wholly void, and prayed to have the same set aside as a cloud upon its title.

To this bill, defendant, Asahel Gage, filed a plea, setting out the levy of the taxes by the proper authorities of the county, city and town, for the years 1874 and 1875; the non-payment thereof; the application for judgment and rendition of judgment in each year, and forfeiture of the lots to the state for want of bidders at the first two tax sales; the levy of the taxes of 1876 and the addition thereto of the amounts for which the lots had been forfeited the preceding years; the non-payment of these taxes; the return of the lots as delinquent for the taxes of 1876; the publication of notice, and other steps required for the purpose of making the tax sale; the rendition of judgment, and the sale in pursuance of such judgment, and the purchase of the lots by the defendant for the amount of taxes, interest and costs adjudged against the lots; and submitted that complainant was barred by such judgment from alleging the illegality of a part of such taxes as a reason for avoiding and setting aside his purchase.

David Fales, for complainant.

Augustus N. Gage, for defendant.

BLODGETT, J.—The sufficiency of the plea as an answer to complainant's bill, is the only question now raised.

No irregularity or illegality is charged in the levy of such taxes, and in the judgments and sales, except that certain of the city taxes were illegally levied, that is, that the city appropriation bill and tax levy, contained certain items, making about 13 per cent. of the entire levy for the year 1875, which the city had no right to collect by taxation; and a careful examination of the plea, shows a full compliance, so far as I am able to note, with all the pre-requisites to make a valid tax sale. No appearance was made by the owner of the lots, or any one in his behalf, at the time of the application for judgment, and no objections to the entry of judgment were made. So far as these lots are concerned, judgment, as shown by the plea, was rendered by default, no cause against judgment being shown; but complainant insists, that as the Supreme Court of this state, on appeal, in a case where the owner of lots appeared before the County Court, on application for judgment, and resisted the same by reason of the illegality of certain portions of the levy, decided such tax to be illegal, and the whole levy vitiated thereby, therefore, these items can now be attacked collaterally, and the sale declared void by reason of the illegality of a portion of the tax.

There is no dispute but what a very large proportion of these taxes were lawfully levied and a charge upon this property. The law provides for a hearing as to the validity of taxes at the time the judgment is asked for. The proceeding to enforce the payment of taxes by a sale of the lots is in a certain sense a proceeding *in rem* against the property, but the owner has a right to be heard, and if he has any reason to urge against the validity of the tax, or any part of it, it is his duty to make it known there. He has his day in court at that time, and if he fails to appear and make known

his objections, it seems to me upon every principle of judicial action, he must be concluded and barred by the judgment. After the judgment has been rendered and the property sold in pursuance thereof, the owner ought not, it seems to me, to be allowed to go behind the judgment and dissect the tax, and, if he can find an illegal item of expenditure for which the municipality has made an appropriation, which has been included in the levy, have the whole assessment and the proceedings of judgment and sale declared void.

Counsel for complainant relies upon *Belleville Nail Co. vs. The People*, 98 Illinois, 399, in which it is said that the "judgment of County Court for taxes, is not conclusive upon the owner, of the liability of the land for taxes assessed on it." In the light of the later case of *Gage vs. Busse*, 102 Illinois, 592, and *Gage vs. Parker*, 103 Illinois, 528, I do not think that the force should be given to the expression which I have quoted from the opinion above, which is claimed by the learned counsel for the complainant. It must be noted in the first place, this case of the *Belleville Nail Co. vs. The People, supra*, was where an application was made for judgment, and not a case like this where the judgment is attacked collaterally. There, the owner of the property appeared on the application for judgment, and resisted the entry of judgment on the ground of the illegality of the tax, claiming that it, being a personal tax, was not a lien on the real estate, which had changed hands, and the expression used in the opinion as to the binding character of a judgment of this kind upon the owner of the property it seems to me is only *obiter*, as it was not necessary for the court to use any such expression in deciding the case as it did. That case was where the owner of the property had appeared, and was then resisting the entry of judgment, but here, the complainant kept still and allowed judgment to be rendered against the property; allowed the sale to take place and

redemption to go by; and now on the ground that some years before, a few items had crept into the appropriation bills of the city, which the city had no right to levy a tax for, seeks to go behind the judgment and set aside the tax sale as wholly void. The Supreme Court in the later case of *Gage vs. Parker*, *supra*, has, almost in express terms, without referring to *Belleville Nail Co. vs. The People*, overruled the principle asserted in that case, where there is no appearance on application for judgment. It seems to me that when the tax-payer has been cited into court in the manner required by the statute, and has had his day in court to say why judgment should not be rendered against his land, he should not afterwards be heard to attack the judgment collaterally. This court should, it seems to me, give full force to the judgment of this County Court, clothed as that court was with full power to hear and determine every question touching the validity of those taxes. Every citizen and land owner knows that his property is subject to the burdens of the Government, and is assessed at certain times, and under stated forms of proceeding, and if he wishes to resist such charges on the ground of illegal assessment, or for any other reason, he should do it when the court is open to hear him, and if he neglects to appear and show cause against the judgment, and judgment is rendered against the property, I think it must be held conclusive.

I therefore think this plea sufficiently answers the charges of this bill, and an order will be entered to that effect.

JOSEPH W. FISKE vs. NEWBERRY C. HILLS, ADMINISTRATOR, ETC., *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MAY, 1882.

IN EQUITY.

1. PARTNERSHIP ASSETS—EQUITY JURISDICTION—MARSHALING OF ASSETS.—Where both the partners of a firm die, leaving co-partnership property which is taken possession of by their individual representatives, a bill in equity will lie in favor of one of the creditors of the firm, against the individual representatives, to have the assets marshaled and distributed to the creditors entitled to them.

2. In such case it is not necessary to obtain judgment before resorting to a court of equity.

3. PROBATE JURISDICTION TO MARSHAL PARTNERSHIP ASSETS, NOT EXCLUSIVE.—The fact that the Probate Court has ample power, where partnership property has come into the hands of representatives of individual members of the firm, to direct the application of such partnership assets to the payment of partnership debts, does not deprive a court of equity of jurisdiction over a bill filed for the same purpose.

4. FEDERAL JURISDICTION OVER PROBATE MATTERS.—Statutory provisions of the various states as to the settlement of estates by the Probate and Surrogate Courts, do not deprive the Federal Courts of jurisdiction in case of the requisite citizenship.

S. Leonard Boyce and *Nelson Smith*, for complainant.

Roberts & Hutchinson, for defendant Hills.

BLODGETT, J.—The complainant, who is a citizen of the state of New York, charges by his bill that, from February 1, 1878, to December 27, 1879, William R. Gould and M. Brooks Gould were co-partners, doing business in Chicago as merchants and dealers in ornamental hardware, under the

firm name of W. R. & M. B. Gould, and that during such time, the complainant sold and delivered to the firm goods to the value of $5,011.60, for which the firm became justly indebted to him, and that $2,511.60 of such indebtedness remains due and wholly unpaid; that on the 27th day of December, 1879, M. Brooks Gould died intestate in this city; and afterwards, on the 12th of January, 1880, the defendant, Newberry C. Hills, was, by the Probate Court of Cook county, duly appointed sole administrator of the estate of said M. Brooks Gould, and duly accepted and entered upon the duties of his office; that on the 15th of June, 1880, said William R. Gould died in this city, leaving a will whereby defendant, Amelia Gould, was duly appointed his sole executrix; that the will has been duly admitted to probate in Cook county, and letters testamentary issued to said Amelia; that at the time of the death of M. B. Gould the firm was possessed of a large amount of partnership assets; that on the appointment of defendant, Hills, as administrator of M. Brooks Gould, he took possession of a large part of the stock in trade and assets of the firm, and inventoried and treated them the same as the individual assets of said M. B. Gould; that some part of the assets of the firm also came to the possession of the executrix of W. R. Gould, and are now, either the original assets or the proceeds thereof, in the possession of the said Amelia Gould, as executrix.

The bill further charges that the co-partnership had not been dissolved up to the time of the death of M. B. Gould, although M. B. Gould had, for some time prior to his death, the exclusive possession of the co-partnership property, and conducted the business, and excluded William R. Gould therefrom, and negotiations were pending between M. Brooks and William R. Gould, for a settlement of their partnership business at the time of the death of M. B. Gould.

It is also charged that both the partners were insolvent at

the time of their respective deaths; that defendant Hills, as administrator of M. B. Gould, and defendant, Amelia Gould, executrix of William R. Gould, have paid none of the co-partnership debts, and have treated the co-partnership assets which came to them respectively as individual assets of the respective decedents, although the co-partnership assets which came to the hands of defendants, are sufficient to pay all or nearly all the co-partnership debts, and that the co-partnership creditors are entitled to be paid the full proceeds of such co-partnership property.

The bill prays that the defendants account for the co-partnership assets which came to their hands respectively; that a receiver be appointed to take possession of such co-partnership assets and administer them in the interest of the co-partnership creditors.

To this bill the defendants have demurred on the ground that the subject matter of this suit is solely within the jurisdiction of the Probate Court of Cook county; that such court has ample power to marshal and distribute the assets according to the equities and priorities of the several individual and co-partnership creditors, and to direct the defendants in relation thereto, and, therefore, this court cannot entertain complainant's bill, but complainant should apply to the Probate Court for such order in regard to the partnership assets as his equities entitle him to.

The case made by the bill shows defendants to be trustees for the creditors of the firm to the extent of whatever co-partnership assets have come to their hands. It shows that, before the dissolution of the firm, the partners died, leaving co-partnership property, which is now in possession of their individual representatives, and that these assets ought to be applied to the payment of the co-partnership debts. There can be no doubt, I think, of the general principle that the co-partnership debts constitute a lien and equitable charge

upon whatever co-partnership property existed at the time of the dissolution of the firm. This position is fully sustained in *Menagh vs. Whitwell*, 52 New York, 146, and *Rainey vs. Nance*, 54 Illinois, 29, and other cases which might be cited. While it may be true, as contended by the defendants, that the Probate Court has ample power under the statute of Illinois to direct the application of co-partnership property to the payment of the debts of the firm, yet, the complainant being a citizen of New York, is not compelled to go into the state tribunal for the purpose of asserting his rights, but may proceed directly against the defendants or any person having possession of the co-partnership assets, no matter under what right he claims them. Under the authorities, there is no necessity for this complainant, the principal debtors being dead, to obtain judgment before resorting to a court of equity, but he may proceed at once, in equity, to have the assets marshaled and distributed to the creditors entitled to them.

There is no doubt but what, under the authorities, the marshaling of the assets of co-partners, or of deceased debtors, for the purpose of applying those assets to the payment of indebtedness of creditors is one of the original sources of equity jurisdiction, and it has been decided often that the statutory provisions of the various states, providing the methods by which estates may be settled by the State, Probate and Surrogate Courts do not deprive a court of equity of jurisdiction, and especially courts of the United States. The subject was fully discussed by the Supreme Court in *Payne vs. Hook*, 7 Wallace, 425.

I have no doubt in this case, upon the charges contained in the bill, showing that the assets of this co-partnership have gone into the hands of these defendants, whether they act under the authority of the Probate Court, or whether they are acting without authority, an action is maintainable

by the creditors of the firm for the purpose of reaching the assets and applying them to the payment of the co-partnership debts.

The demurrer to the bill is therefore overruled.

WILLIAM G. WILSON vs. SINGER MANUFACTURING COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MAY, 1882.

PATENT LAW—PENALTIES.—A person who affixes the word "patented" and gives the date of the patent upon an article which has been patented, but the patent on which has expired by limitation, is not liable to a penalty under section 4901, United States Revised Statutes: affirming *Wilson vs. Singer Mfg. Co.*, 9 Bissell, 173.

Walter B. Scates, for plaintiff.

William H. King, for defendant.

DRUMMOND, J.—The last clause of section 4901 of the Revised Statutes, declares that "every person who in any manner marks upon, or affixes to any unpatented article the word 'patent,' or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable for every such offense to a penalty of not less than one hundred dollars, with costs; one half of said penalty to the person who shall sue for the same, and the other to the use of the United States, to be recovered by suit in any District

Court of the United States within whose jurisdiction such offense may have been committed."

The plaintiff in error brought an action in the District Court under this statute. The declaration contains three counts, all of which have substantially this statement: that on the first day of November, 1876, and from that time up to the commencement of the suit, the Singer Manufacturing Company did, knowingly, willfully and negligently, and contrary to the statute in such case made and provided, and for the purpose of deceiving the public, print, mold, cast, stamp, engrave, mark, and affix upon sliding plates the words or inscription, "patented September 10, 1846, May 8, 1849, November 13, 1850, August 4, 1851, August 12, 1851, April 11, 1854, May 30, 1854, November 21, 1854, December 19, 1854, May 29, 1855, and October 9, 1855," upon each of 100,000 Singer sewing Machines. To this declaration, the Singer Manufacturing Company demurred, and the District Court sustained the demurrer, and entered final judgment.[1] Wilson took out a writ of error, and the case is now before this court upon the judgment so rendered, and the question is whether the judgment was correct. I think it was.

The only doubt upon the subject arises from the allegations in the declaration that these plates were affixed in the manner stated for the purpose of deceiving the public. But what is the offense described in the statute for the commission of which a suit is authorized to be brought? I think it is this—and that it must appear by the allegations of the declaration—an intention on the part of the defendant to affix a stamp or plate, indicating that there was at the time a present subsisting patent upon the machine; and unless that appears the offense is not complete. Does that appear

[1] *Wilson vs. Singer Mfg. Co.*, 9 Bissell, 173.

on the face of this declaration? I think not. It is not disputed but that these patents existed upon the machine, and were issued in the manner and the time stated. Do they show that there was, at the time these plates were affixed to the machine, an existing patent upon it or upon any part of it? They do not. We have to apply the law to the declaration, and on being so applied it follows as a necessary conclusion that there were no existing patents upon any part of the machine at the time the plates were affixed. Under the law, it appears all the patents thus issued have expired. If the allegations of the declaration did not contradict the fact that there was a subsisting patent, then probably the declaration would be sufficient, as if it had said that the word "patented" was affixed to the machine with the intention of deceiving the public; that might be sufficient without other language; but suppose it had said the defendant had affixed this stamp, viz., "this machine was patented in the year 1840," with the intention of deceiving the public; that would be equivalent to saying that there was a patent issued on this machine which has expired, and therefore, there was no existing patent upon it. The same is true of the statement as to patents being issued upon this machine at the dates named; when we apply the law to the statement, it shows if these patents issued they have all expired, and therefore there is no subsisting patent upon the machine or any part of it, and the offense is not complete.

The judgment of the District Court is affirmed.

In re THE STATE INSURANCE COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MAY, 1882.

IN BANKRUPTCY.

1. CORPORATIONS—INSURANCE COMPANIES—REDUCTION OF STOCK—ISSUING PAID UP STOCK FOR PARTLY PAID STOCK—LIABILITY OF STOCKHOLDERS.—Where the stock of an insurance company has not been fully paid up and the stockholders reduce the amount of the capital stock of the company, and full paid stock is issued to take up the partly paid stock at a certain proportion of the face thereof, the reduction of the stock does not relieve those who are stockholders at the time from their liability on the contracts then existing against the company, but the stockholders to whom full paid stock is issued, would not be liable individually on contracts made after the date of the reduction of the capital stock.

2. BANKRUPTCY—LIABILITY OF SHAREHOLDERS TO PAY IN FULL CLAIMS EXISTING AT TIME OF REDUCTION OF CAPITAL STOCK—RIGHTS OF SUBSEQUENT CREDITORS.—In such a case if the company becomes a bankrupt, and the assignee pays out of the general assets a 40 per cent. dividend to all creditors alike, and the remaining general assets are not sufficient to pay the valid claims arising subsequent to the reduction of the capital stock, the shareholders of the date of the reduction are liable to the full extent of the claims existing prior to the reduction; and the fact that a 40 per cent. dividend has been paid to their special creditors out of the general assets of the company, will not to that extent relieve them from their full liability, but they will be required to restore to the general fund such sum as had been paid from it to their special creditors, and which is needed to pay in full the claims of the subsequent creditors.

John Van Arman and *Frank J. Smith*, for petitioners.

B. D. Magruder, *Jewett & Norton*, *Goudy & Chandler* and *Mason Bros.*, for respondents.

DRUMMOND, J.—Since an opinion was given by the court upon this case, some further arguments have been presented by both sides, and the case has been further considered. The controversy is in relation to an order made by the District Court on July 8, 1880, which declared that every person who was a holder of unpaid or partially paid stock in the company on the 12th day of January, 1871, was liable to the amount then remaining unpaid upon such shares of stock, in such sum as was necessary to pay the liabilities of the company, which had accrued, or might thereafter accrue, upon all policies of insurance issued by the company prior to that day; and an order making an assessment of 12½ per cent.; and an order declaring that those stockholders who, within 60 days, should pay to the assignee $10 per share of the stock, were entitled to receive a receipt in full of all their assessments, and be forever discharged from all liability.

On the 12th day of Janury, 1871, at an annual meeting of the stockholders of the company, a resolution was unanimously passed, by which the capital stock of the company was reduced to $500,000, it having been originally fixed at $1,000,000, upon which there had been 24 per cent. paid, 20 per cent. originally, and 4 per cent. having been added as an assessment levied to make good the impairment of the capital stock. The resolution of the 12th of January, 1871, adopted as a by-law, declared that the outstanding certificates of stock should be canceled, and full-paid certificates for 20 per cent. of the canceled certificates issued. The company became insolvent and it was necessary to resort to the stockholders in order to pay the creditors of the company. The District Court held, and in that opinion this court concurred, that the reduction of the stock did not relieve those who were stockholders at the time from their liability on the contracts then existing against the company, but that the

stockholders to whom the full paid stock was issued were not liable individually on contracts made after January 12, 1871.

The main controversy in the case grows out of the fact that the assignee has paid to the various creditors about 40 per cent. of the claims which have been proved, including the claims on contracts existing at the time the stock was reduced. No part of this 40 per cent., however, came from the stockholders whose stock had been reduced, and to whom full-paid stock had been issued, but from other assets of the company. It would seem, upon principle, that in case of the insolvency of a company like this, all its assets and all liability of the stockholders for the payment of the debts ought to be used for that purpose,—in other words, that all obligations ought to be met and discharged in order to pay the debts of the company. The company was then in this position: the stockholders, on the 12th of January, 1871, in case the assets of the company were not sufficient to pay its debts, were liable for all claims on contracts at that time in force. They were not liable on subsequent contracts; for these latter, therefore, the creditors could only look to other assets of the company. As at the time the assignee distributed the 40 per cent. to the creditors, it could not be known to what extent a call would have to be made on the stockholders, it would seem that it was proper to make the distribution generally to all the creditors, and it must be regarded as a distribution subject to correction upon the collection of all the assets of the company, and upon the payment of all liabilities of the stockholders. But now it is ascertained that the stockholders must be called upon to meet an existing deficiency, and we have to take the case, therefore, upon the basis that a portion of the claims arising on contracts in force on the 12th of January, 1871, have been paid with other assets of the company. It is urged that the stockholders stand in the position

of sureties to pay the debts of the company. It is, perhaps, not material what term we apply to them. Whatever is legally due from them constitutes a fund for the payment of the debts of the company. Their liability is undoubtedly secondary, namely, if the assets of the company are not sufficient to liquidate the claims against it. If the stockholders, on the 12th of January, 1871, are relieved, in part, from their liability, because some of the debts against them have been paid by other assets of the company, then they are to that extent discharged from their legal obligations which, we have seen, were to the full extent of all debts accruing upon contracts at that time in force. That is, they would be, in part, released from the claims against them, because the assignee, from the general assets of the company, has paid 40 per cent. to their creditors. In case the subsequent creditors of the company cannot be fully paid out of the general assets, the question is whether the stockholders can thus be partially released from their obligations, and whether on the contrary they should not be compelled to pay all that was due, and, if their creditors have received anything from other assets of the company, whether that amount should not be restored to the general fund from payments to be made by the stockholders of the 12th of January, 1871. It seems to me that, in such a case, they must discharge all their obligations—they must pay the amount in full to meet the claims on contracts existing at that time, and, of course, including an amount sufficient to restore to the general fund what has been taken from it; and therefore I think there should be an order of the District Court made requiring the stockholders to pay enough to meet all liabilities on contracts existing on the 12th of January, 1871.

The 12½ per cent. assessed by the District Court was ordered on reports made by the register, to whom various

questions connected with this branch of the case were referred. He stated that the liability against the company on the 12th of January, 1871, on claims proved, was the sum of $164,502.38, which he said had been reduced by the payment of the 40 per cent., as already stated. The 40 per cent. paid on these claims amounted to $50,379.36, and it appears by this report, and by the admission of the petitioners in an amendment which they have filed to their petition, that a portion of the original debt has been expunged, thus reducing the amount due. In view of the various circumstances which may have occurred since the order was entered by the District Court, it may be a question whether this court should direct the District Court to make an assessment on the stockholders for any definite amount, or simply to instruct it to make an assessment sufficient to pay all the liability existing on the part of the stockholders for the debts due on the contracts in force January 12, 1871, without crediting upon those debts the 40 per cent. that has been paid by the assignee. The order of the District Court will, therefore, necessarily have to be changed, as it appears to have been made upon the assumption that the $50,379.36 was to be deducted from the amount specially due by the stockholders.

It is, perhaps, only fair to state that the question which has been discussed in this court, and now decided, does not seem to have been presented to the District Court at the time the order was made which is now the subject of review.

SAMUEL BAXTER *et al.* vs. HARTFORD FIRE INSURANCE COMPANY.

CIRCUIT COURT—DISTRICT OF INDIANA—JUNE, 1882.

INSURANCE OF GRAIN IN ELEVATOR—RIGHT OF COMMISSION MERCHANT TO INSURE FOR FULL VALUE.—Where a commission merchant is engaged in buying and selling grain, and in connection with such business owns and operates an elevator in the usual way, if he receives wheat and gives receipts therefor which contain the following provision: "Wheat in store subject to our charges. Fire at owner's risk," he has such an interest in the wheat as authorizes him to insure it at its full value.

David Turpie, for plaintiffs.

Harris & Calkin, for defendant.

GRESHAM, J.—This is a suit on a fire policy issued by the defendant to the plaintiffs on grain, seeds and sacks, their own, or held by them in trust or on commission, or sold but not delivered, contained in their elevator at Rochester, Indiana. The elevator and its contents were destroyed by fire. As to 2,238 bushels of wheat in the elevator at the time of the fire, it is averred in the third paragraph of the answer that this wheat was delivered to the plaintiffs by farmers after the insurance was taken, every one of whom, at the time of such delivery, received and accepted from the plaintiffs a written instrument or contract, specifying and describing the amount and character of wheat by him delivered, and concluding as follows: "Wheat in store subject to our charges. Fire at owner's risk." It is also averred that it was not the intention of those depositing the wheat, or the plaintiffs, that it should be covered by the policy sued

on, and that at the time of the fire the plaintiffs had in the elevator wheat of their own. These facts are pleaded against a recovery for more than the plaintiffs' lien for charges on the 2,238 bushels of wheat.

The plaintiffs demur to the third paragraph of the answer.

It is urged by the defendant's counsel that the wheat described in the paragraph demurred to was held on deposit, under an agreement between the depositors and the plaintiffs that it was not to be insured, and that therefore the plaintiffs, who were bailees, had no authority to put it under their policy and charge the depositors for insurance.

The plaintiffs were commission merchants, engaged in buying and selling grain, and in connection with their business they owned and operated an elevator in the usual way. Those who deposited wheat in this elevator took receipts for the same, knowing that it could never be distinguished from the mass with which it was mingled, and that the plaintiffs could and would sell and ship it as their own in the course of their business. It is not claimed that this 2,238 bushels of wheat was to be kept separate from other wheat in the elevator of the same grade. The title to this and other wheat deposited in the elevator as it was, remained in the depositors, or it passed to the plaintiffs. The contract between the plaintiffs and the depositors was, not that the latter should on demand receive the identical wheat stored in the elevator, but that the plaintiffs should deliver wheat equal in amount and grade to that deposited, or account for its full value. Being authorized to sell the wheat on their own account as fast as it was deposited in the elevator, I think the plaintiffs had such an interest in it as authorized them to insure it for its full value. They were under no obligation to return the identical wheat stored in their elevator, and no one expected them to do so. *Carlisle vs. Wallace*, 12 Ind. 252.

But, on the theory that the title to the wheat described in the paragraph demurred to remained in the depositors, and that they took the risk of loss by fire, under their contract with the plaintiffs, still the latter were liable for its value if fire should result from carelessness on the part of their employés, and they had a right to protect themselves from this liability by insuring the wheat for its full value.

The defendant was not a party to these agreements. It is true, there is an averment in the paragraph demurred to, that it was not the intention of the depositors or the plaintiffs that the wheat should be covered by the policy sued on; but that is only the pleader's construction of the instruments or contracts which the depositors received from the plaintiffs.

Demurrer sustained.

FURMAN STOUT *et al.* vs. COMMERCIAL UNION ASSURANCE COMPANY.

CIRCUIT COURT—DISTRICT OF INDIANA—JUNE, 1882.

1. INSURANCE ON WHOLESALE GROCERIES—WRITTEN PART OF POLICY MODIFIES PRINTED—RIGHT TO KEEP SALTPETER.—Where a policy of insurance on a wholesale stock of groceries, in the written part of the policy gives permission to keep "all articles kept for sale in such stock," and in the printed portion it is provided that the keeping of gunpowder, saltpeter, etc., without written permission, shall avoid the policy, it was *held* that,—it being admitted that saltpeter is usually kept for sale by wholesale grocers and was in fact an article in the stock of the assured at the time the risk was taken—the above written clause limited the printed condition and allowed the keeping of saltpeter.

2. WRITTEN AND PRINTED PARTS OF POLICY CONSTRUED.—The fact that in such policy special written permission was given to keep gunpowder does not prove that it was the only one of the prohibited articles which was excepted from the printed condition.

3. POLICY CONSTRUED AGAINST INSURER.—Insurance companies being in the habit of preparing their own policies, if doubts arise in their construction, they will be resolved against the company.

4. *Steinbach vs. Insurance Co.*, 13 Wallace, 183, distinguished.

Claypool & Ketcham and *Martindale & Son*, for plaintiff.

Harrison, Hines & Miller and *McDonald & Butler*, for defendant.

GRESHAM, J.—The Commercial Union Assurance Company of London issued a fire policy to the plaintiffs for $5,000 for one year from the second day of July, 1880, for a premium of $———.

The property covered was described in the written part of the policy, which reads thus: "$5,000 on their stock in trade

as wholesale grocers, comprising all articles kept for sale in such stock in, etc., Nos. 107 and 109 South Meridian Street, Indianapolis, Indiana, $50,000 total insurance. Permission is hereby granted the assured to keep fifty pounds of gunpowder on the premises without prejudice to this policy."

It is provided in the printed part of the policy "that if the assured shall keep or use gunpowder, fireworks, nitro-glycerine, phosphorus, saltpeter, nitrate of soda, petroleum, naphtha, gasoline, benzine, benzol or benzine varnish, or keep or use camphene, spirit gas or any burning fluid of chemical oils, without written permission in this policy, the policy shall be void." Also, that "this company shall not be liable * * * for any loss caused by the explosion of gunpowder or any explosive substance."

The building and its contents were destroyed by fire during the life of the policy, and this suit is brought to recover the amount of the risk.

The insurer sets up in the third paragraph of its answer, that at and before the fire the assured had in the building described in the policy two hundred and eighteen pounds of saltpeter, without the insurer's written consent in the policy. To this paragraph the assured reply that saltpeter is an article in a wholesale grocer's stock; that it is usually kept for sale as a part of such stock; that they had on hand at the time the insurance was taken, and at the time of the fire, for sale to their customers, and for no other purpose, from one hundred to three hundred pounds of saltpeter, that being a reasonable amount, and no more than the trade demanded; and that the insurer knew the assured were carrying on the business of wholesale grocers at the time the risk was taken. The insurer demurs to this paragraph of the answer.

Does the written part of the policy describing what was

intended to be covered by the risk, as "all articles kept for sale in such stock" limit or modify the condition or warranty contained in the printed part which prohibits the keeping of saltpeter?

There would seem to be no difficulty in answering this question in the affirmative, if permission were not given in the written part of the policy to keep gunpowder, that being one of the prohibited articles.

There is weight in the argument that by expressly mentioning gunpowder, and excepting it from the condition, that it was to remain in force as to the other prohibited articles. On the other hand, the insurer knew at the time the risk was taken that it was insuring a stock of wholesale groceries, and in describing the property insured language was employed broad enough to include all articles kept for sale in such stock. Besides this, the demurrer admits that saltpeter is usually kept for sale by wholesale grocers, and that it was in fact an article in the stock of the assured at the time the risk was taken. The keeping of saltpeter under these circumstances should not be allowed to avoid a policy.

The assured are entitled to a liberal construction of the contract, the written part of which embraces all articles belonging to a wholesale grocer's stock. Saltpeter, as already stated, belongs to such stock; therefore, it may be said written permission was given in the policy to keep saltpeter.

Insurance companies, it is known, are in the habit of preparing their contracts to suit themselves, and where doubts arise in their construction, it is not unfair to resolve these doubts against the insurer. Conditions and warranties in policies, especially where numerous and in fine print, should be strictly construed against the insurer, and if, in reading the written part of the policy in suit, in connection with the condition or warranty which is relied on by the insurer, there be doubts as to whether it was intended to include saltpeter in

the risk, the assured are entitled to the benefit of these doubts.[1]

The case of *Steinbach vs. Insurance Co.*, 13 Wallace, 183, is relied on in support of the demurrer.

That was a suit on a policy against fire, and the subject of insurance was described in writing in the body of the policy, as follows: "On his stock of fancy goods, toys and other articles in his line of business, contained in the brick building, situated, etc., and now in his occupancy as a German jobber and importer. Privileged to keep fire-crackers on sale." The premium paid was forty cents on the one hundred dollars. Among the second class of hazards, classed as hazardous No. 2, were enumerated fire-crackers in packages, and it was stated that they added to the rate of premium ten cents on the one hundred dollars, and classed as especially hazardous, were fire-works, which added fifty cents more to the rate, and to be covered, were to be especially written in the policy.

The fire originated in fireworks which the assured had in the store for sale without written permission in the policy, and this being admitted, he offered to prove on the trial "that fireworks constituted an article in the line of business of a German jobber and importer." The evidence was rejected, and the assured took the case to the Supreme Court on a writ of error, where it was affirmed. The assured insisted in that case that the language "other articles in his line of business as a German jobber and importer" covered fireworks. It was not claimed that fireworks were covered

[1] *Franklin Ins. Co. vs. Brock*, 57 Pennsylvania St. 74; *Grant vs. Lexington Fire Ins. Co.*, 5 Indiana, 23; *Niagara Falls Ins. Co. vs. De Graff*, 12 Michigan, 124; *Elliott vs. Hamilton Mutual Ins. Co.* 13 Gray, 139: *Viele vs. Germania Ins. Co.*, 26 Iowa, 9; *Hall vs. Ins. Co. of North America*, 58 New York, 292; *Citizens' Ins. Co. vs. McLaughlin*, 53 Pennsylvania St. 485; *Archer vs. Merchants', etc., Ins. Co.* 43 Missouri, 422.

by the policy because they were an article in stock of fancy goods and toys in the business of a German jobber and importer, but because they were an article in the line of Steinbach's business.

If the business of importing and jobbing fancy goods and toys from Germany was well understood, in well known articles like the business of wholesale grocers, Steinbach's business might embrace all or less than all of the articles belonging to such a business.

In the case at bar, saltpeter is claimed to be covered by the policy—not because it was an article in stock and business of the assured, but because the subject insured was a stock of wholesale groceries, comprising all articles kept for sale in such stock, one of which was saltpeter.

I think the cases are distinguishable. And further, fireworks were classed in *Steinbach vs. Insurance Co.* as especially hazardous and added fifty cents more on the one hundred dollars premium. This fact seems to have had weight with the Supreme Court.

"They (fireworks) are among the goods described as especially hazardous," says the court in the brief opinion written by Chief Justice Chase, "and add fifty cents on the one hundred dollars to the ordinary rate of insurance. It is impossible to think they are described by the general terms used in the policy." The insurance was at the ordinary rates.

It does not appear from the policy in suit that any increased rate was expected for keeping saltpeter; and written permission being given to keep gunpowder,—a much more explosive and dangerous substance than saltpeter—it would be unreasonable, if not unjust, to hold the policy void because the latter was kept. The demurrer is overruled.

UNITED STATES vs. JOHN P. KELLAR.

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—JUNE, 1882.

NATURALIZATION—MARRIAGE OF WIDOW—INFANT SON.—If a widow and her infant son who are citizens of a foreign country come to this country, and she marries a naturalized citizen of the United States, she thereby becomes a duly naturalized citizen, and her minor son also thereby becomes a citizen.

James A. Connolly, U. S. District Attorney, for United States.

Timothy T. Beech and *Edward Lynch*, for defendant.

Indictment for illegal voting.

HARLAN, J.—The question presented for determination is whether the defendant, having reached his majority on the twenty-second day of May, 1880, was entitled to vote at the election for representative in the Congress of the United States, held in November, 1880. He possessed the requisite qualifications prescribed by the local laws as to residence in the township and state; but it is contended that he had not been admitted to citizenship of the United States, which, in Illinois, is a pre-requisite to the exercise of the elective franchise. His parents were subjects of Prussia, the father dying there in 1865, without ever having been in this country. Subsequently the mother removed to the United States, bringing her infant son, and in 1868 intermarried here with Michael Gaschka, a naturalized citizen.

Section 2167 of the Revised Statutes of the United States,

reproduced from an act passed May 26, 1824, (4 St. at Large, 69,) provides that—

"Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the declaration required in the first condition of section 2165; but such alien shall make the declaration required therein at the time of his admission; and shall further declare on oath, and prove to the satisfaction of the court, that for two years next preceding, it has been his *bona fide* intention to become a citizen of the United States; and he shall, in all other respects, comply with the laws in regard to naturalization."

It is conceded that the defendant has never made the declarations nor furnished the proof required by that section, nor complied with the general laws prescribing the mode in which subjects of other countries may become naturalized citizens of the United States. The contention of the district attorney is that section 2167 embraces every case of foreign-born minors residing in this country, who may wish to become citizens of the United States; in other words, every such minor must, to become a citizen, make the declaration and proof required by that section. So argues the district attorney. In this view the court does not concur.

Section 2172 of the Revised Statutes of the United States, brought forward from an act approved April 14, 1802, (2 St. at Large, 155,) provides that—

"The children of persons who have been duly naturalized under any law of the United States, or who, previous to the

passing of any law on that subject by the Government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof; but no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the Revolutionary War, shall be admitted to become a citizen without the consent of the Legislature of the state in which such person was proscribed."

And section 1994, which is reproduced from the act of February 10, 1855, (10 St. at Large, 604,) declares that "any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

Since the several sections which have been quoted are in the same revision of the statutes, it is the duty of the court to give them, if possible, such construction as will make them all operative. Consistently with any fair or reasonable interpretation of the language employed by Congress, the court should reject any construction which would make one section inconsistent with another relating to the same general subject.

It is not denied that the mother of the defendant belonged to the class of persons who, under the laws of Congress, might have been lawfully naturalized. Upon her marriage, therefore with a naturalized citizen of the United States she became, under the plain words of section 1994, *ipso facto*, a citizen of the United States, as fully as if she had complied with all the provisions of the statutes upon the subject of natural-

ization. There can be no doubt of this, in view of the decision of the Supreme Court of the United States in *Kelly vs. Owen*, 7 Wall. 496. It became necessary in that case to construe the act of February 10, 1855, which, in respect of the matter now before us, is similar to section 1994 of the Revised Statutes. This language was there used by the court:

"As we construe this act, it confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide. The terms 'married' or 'who shall be married,' do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. They mean that whenever a woman who, under previous acts, might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also. His citizenship, whenever it exists, confers under the act, citizenship upon her."

The object of the act, said the court, was to allow the citizenship of the wife "to follow that of her husband, without the necessity of any application for naturalization on her part."

The mother of the defendant having thus become a citizen by force alone of her marriage with a naturalized citizen in 1868, did not the defendant, being then a minor and dwelling in the United States, himself also become, *ipso facto*, a citizen? It seems to the court that this question must be answered in the affirmative. The case seems to be so distinctly one of those embraced by the very language of section 2172, that argument could not make it plainer.

It was suggested that the act of 1802, from which, as we have seen, section 2172 is taken, was intended to be tempo-

rary in its operation, and to apply only to cases arising previous to its passage. In support of that proposition reference was made by counsel to *Campbell vs. Gordon*, 6 Cranch, 176. But the court does not perceive that that case maintains, or that the language of the act of 1802 in any degree justifies, any such interpretation of the statute.

It is quite certain that the reproduction, in section 2172 of the revision of the statutes, of the principle embodied in the act of 1802, was for the purpose of declaring, as the established policy of the Government, that the children of persons who have been duly naturalized under any law of the United States, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United states, be considered as citizens thereof. The only doubt which might have arisen as to the application of that section to the present case is whether a woman, becoming a citizen, under section 1994, solely in virtue of her marriage with a naturalized citizen, can be said to have been "duly naturalized" under a law of the United States. That doubt, we have seen, is removed by the decision in *Kelly vs. Owen*. The marriage of the defendant's mother with a naturalized citizen was made by the statute an equivalent in respect of citizenship to formal naturalization under the acts of Congress. Thenceforward she was to be regarded as having been duly naturalized under the laws of this country, and her infant son, then dwelling in this country, was thereafter to be considered not an alien, but as a citizen, And this, we may remark, is not a new feature in the history of naturalization, as is shown by the case of *Campbell vs. Gordon*, *supra*, where it was held, under the act of 1802, that the naturalization of a father, at the time his daughter was an infant resident of this country conferred upon her full rights of citizenship, although

she had taken none of the steps required by the naturalization laws.

Such being the legal effects of sections 1994 and 2172, we come to inquire as to the construction of section 2167. Its language, literally interpreted, might embrace the case of the defendant; that is, he was a foreign-born minor, who had resided in the United States five years including the three years next his majority. But we have seen that the defendant ceased to be an alien when his mother acquired citizenship through her marriage with Gaschka. He was thereafter to be treated as the child of one "duly naturalized;" in other words, as a citizen. Manifestly, therefore, if section 2167 receives the construction contended for by the Government, the marriage of defendant's mother would be deprived, in large degree, of that effect which section 1994, as construed in *Kelly vs. Owen*, *supra*, was intended to have. But all of the sections can be harmonized, and effect given each, if section 2167 be construed, as this court thinks it must be, as not embracing the case of a minor who became invested with citizenship in virtue of the marriage of his mother with a naturalized citizen of the United States, but only such minors as are alien when they reach their majority, and who, therefore, cannot become citizens except in the mode specifically set out in section 2167.

For these reasons, in which my brother TREAT, the learned district judge, concurs, the defendant must be discharged. An order to that effect will be entered.

JOHN J. BLAIR *et al.* vs. CHICAGO & PACIFIC RAILROAD COMPANY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY, 1882.

IN EQUITY.

FEES—COMMISSION TO CLERK ON REDEMPTION.—A rule of the Federal Court requiring a person redeeming from a foreclosure sale to pay, in addition to the amount required to effect redemption, a commission of one per cent. to the clerk, sustained.

This court some time back adopted and entered rules in regard to the redemption of property from sales under decrees in chancery. One of these rules is in these words:

"Any defendant in the suit in which such decree is entered, his heirs, administrators or assigns, or any person interested through or under the defendant in the premises so sold, may within twelve months from said sale, redeem the real estate so sold, by paying to the purchaser thereof, his heirs, executors or assigns, or to the clerk of this court, for the benefit of such purchaser, his executor, administrators or assigns, the sum of money for which said premises were sold or bid off, with interest at the rate of ten per cent. per annum from the date of such sale, and in case such redemption is made by payment of the money to the clerk, the person so redeeming shall also pay an additional sum of one per cent. on the amount so paid in, as the clerk's fee for receiving and disbursing said redemption money; and the clerk on receiving said redemption money, shall at once deposit the same in the registry of the court."

A similar rule exists when the redemption is made by a creditor of the defendant, who may be entitled, under the law, to redeem.

The property of the defendant was sold under deed of foreclosure for $916,100. The purchasers of the property refusing to accept the redemption money, the railroad company was required to pay, and did pay, to the clerk of this court, $1,012,392.85, being the amount of the sale, with ten per cent. from the date of sale, as required by the local statute, and one per cent. on the purchase money and interest, as required by the before mentioned rule. Subsequently, and after the expiration of several days, the clerk, under the order of the court, paid out of the fund to the purchasers of the property $1,002,369.19, being the purchase-money and interest, leaving in court, of the fund, the sum of $10,023.66.

The company presented its petition, asking that the balance of the fund in court, $10,023.66, be paid over to it.

E. Walker, for petitioner.

No attorney appeared for the clerk.

HARLAN, J. (orally.)—The petition of the company proceeds upon the ground that the court had no power, by rule or otherwise, to require a party, exercising the right of redemption given by statute, to pay anything more than the purchase-money with interest. But in this view the court does not concur. The statutes of the United States provide that "for receiving, keeping and paying out money, in pursuance of any statutes or order of court," there shall be paid to the clerk, "one per cent. of the amount so received, kept and paid."[1]

The rules in question were made with reference to the

[1] United States Revised Statutes, sec. 828, 10 Statutes at Large, pp. 163-7.

decision of the Supreme Court of the United States, in *Brine vs. Insurance Company*, 96 United States, 627, which, reversing the long established practice in this court, ruled that the right of redemption given by the statutes of Illinois, constituted a rule of property, to be respected alike in the Federal and State courts in cases of decretal sales. The law of the state prescribed the mode in which redemption might be effected, and it was deemed necessary that this court should establish regulations upon the subject in comformity, as near as might be, with those governing the courts of the state. The rules in question were doubtless also made with reference to the statute of the United States, which fixed one per centum as the amount to be paid to the clerk on money received, kept and paid out by him, in pursuance of any statute or of an order of court. And that statute, it may be observed, is to be construed in connection with other provisions which require the clerk to report to the Attorney General semi-annually, all fees and emoluments of any kind by him received, and which limit the amount to be retained for his personal compensation in any one year to the sum of $3,500, all above that sum to be accounted for by him to the United States. It is not perceived why, upon money paid to the clerk of the court for the purpose of redeeming property sold, and by him kept and paid out, the statutory commission of one per cent. shall not be allowed as well as upon other moneys received, kept and paid out by him under order of court.

This case seems to be embraced by the language of the statute, and the rule of court is only in furtherance of the objects intended to be accomplished by it. The amount so paid to the clerk by the party redeeming may be regarded not only as a part of the costs of the litigation, to be paid by the losing party, but also as part of the necessary costs and expenses incurred by the Government in carrying on the

business of the court. That the right to redeem is a statutory right given by the state does not affect the question. The purchaser of the property could not be required to pay the commissions of the clerk, because he was not obliged to surrender the property and the benefit of his purchase unless he received the full amount of his bid and interest thereon. The only mode, therefore, for obtaining the per cent. which the statute in express words, allows on all moneys received, kept and paid out by the clerk, was to require payment thereof by the losing party, that is, the party redeeming.

The duty of the court to allow the redemption given by the state law must be discharged subject to the provision of the statute fixing the amount to be paid to the clerk on all moneys received, kept and paid out by him under order of court.

The petition is denied.

The clerk is entitled to commissions upon the proceeds of prize property, sold by interlocutory order, which are paid into court: *The Avery*, 2 Gallison, 308; and also to commissions on money deposited in bank under a decree of court and subject to its order; *Ex parte Prescott*, 2 Gallison, 146. But the clerk is not entitled to commissions unless the fund be actually paid into court, or agreed to be so considered: *Ex parte Plitt*, 2 Wall Jr. C. C. 453. [*Reporter.*

WILLIAM A. FORD vs. CHARLES W. KURTZ *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY, 1882.

IN EQUITY.

UNINTENTIONAL INFRINGEMENT OF PATENT—COSTS.—Where the infringement is neither malicious nor willful, and the defendants offer at the outset to pay the complainant the amount of net profits realized by them, which offer is rejected, the defendants will not be required to pay the costs unnecessarily accumulated by the complainant.

George G. Bellows, *John S. Boothe* and *H. C. Ballard*, for complainant.

E. A. Sherburne, for defendants.

HARLAN, J. (orally.)—The findings of the master in this case are correct. The infringement by defendants of complainant's patent was neither willful nor malicious. The case does not justify a decree against them beyond the net profits realized from the manufacture and sale of the patented articles. That sum is found to be $28.06. For that sum complainant may have a decree. In reference to the costs, the conclusion is justified by the record that the defendants were willing, at the outset, and, through their attorney, offered to pay to the complainant the amount of the net profits realized by them. But the complainant was desirous of mulcting them in damages under circumstances not calling for such a course. Costs have been unnecessarily accumulated. I think it just that the parties be required to pay their own

costs, and each party must pay one-half of the master's fee, as it may hereafter be fixed by the circuit judge.

If the complainant is awarded only nominal damages and no profits, he can only recover the costs up to the order of reference to the master, and the defendant will be allowed the subsequent costs. *Garretson vs Clark*, 4 Banning & Arden, 539; S. C. 8 do. 360. [*Reporter.*

CAROLINE MITCHELL vs. ELISHA W. TILLOTSON *et al.*

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—JULY, 1882.

REMOVAL OF CAUSE—CONTROVERSY—PARTIES TO SUIT.—Where the complainant, claiming title to certain real estate under one who has given a trust deed thereon, files a bill setting up that her title is superior to that of the trustee or the rights of the holder of the notes secured by the trust deed, the trustee is an indispensable party to the suit, and the holder of the notes cannot, on the ground of his own citizenship, remove the cause from the State to the Federal Court, the trustee being a citizen of the same state with the complainant.

This was a suit in equity commenced in the Circuit Court of McLean County, Illinois, and was thence removed upon the petition of Tillotson and the Massachusetts Mutual Life Insurance Company into this court. The complainant moved to remand the cause to the State Court upon the ground that it was not removable under the statutes regulating the jurisdiction of the courts of the United States.

Williams, Burr & Capen, for complainant.

Weldon & McNulta, for defendants.

HARLAN, J. (orally.)—The complainant is, and was at the commencement of the suit, a citizen of Illinois, as were also the defendants Tillotson and Winegardner. The insurance company is a corporation created by the laws of Massachusetts. The facts bearing upon the question of jurisdiction are these: Winegardner having borrowed from the insurance company the sum of $3,500 (for which he gave his bond or note with interest coupons attached,) executed a deed of trust conveying to Tillotson two lots or parcels of land in Bloomington, Illinois, in trust, to secure the repayment of the amount so borrowed. The deed provided that in case of default in the payment of the bond, or of any interest coupon at maturity, the principal should become due and the trustee should, upon the application of the legal holder of the bond, after having advertised for thirty days in a public newspaper in McLean county, sell the premises and all the right, title and equity of redemption and homestead of Winegardner, to the highest bidder, for cash, execute to the purchaser a conveyance in fee for the premises so sold, and apply the proceeds to the mortgage debt. A default in paying interest having occurred, the trustee, in conformity with the demand of the company, advertised the property for sale. The present suit was brought by Mrs. Mitchell for the purpose of enjoining the sale of one of the lots. Her suit proceeds upon the ground that the lot in question is her separate property, and that whatever rights were acquired in or to that lot by Tillotson or the insurance company under the beforementioned deed of trust are subordinate and inferior to hers.

The citizenship of Winegardner seems to be immaterial, since the title appears from the pleadings to have passed absolutely either to complainant, or, under the deed of trust,

to Tillotson. He has no interest whatever in the result of the present controversy. But Tillotson acquired such title in and interest to the property as makes him an indispensable party defendant with the company. The complainant could not obtain the relief asked without joining him as a defendant with the insurance company. In other words, there is in the suit no separable controversy between the complainant and the insurance company which can be fully determined as between them without the presence of the trustee as a party defendant. The trustee and the company are inseparably connected in resisting the relief sought. It is, therefore, a material circumstance that Tillotson is a citizen of the same state with the complainant. That fact defeats the jurisdiction of the Federal Court and the cause must be remanded to the State Court.[1]

In *Blake vs. McKim*, 103 United States, 339, it was said: "We are of opinion that Congress, in determining the jurisdiction of the Circuit Courts over controversies between citizens of different states, has not distinctly provided for the removal from a State Court of a suit in which there is a controversy not wholly between citizens of different states, and to the full or final determination of which, one of the indispensable parties, plaintiffs or defendants, on the side seeking the removal, is a citizen of the same state with one or more of the plaintiffs or defendants against whom the removal is asked."

The cause must, therefore, be remanded to the State Court. It is so ordered.

DRUMMOND and TREAT, JJ., concurring.

[1] *Coal Company vs. Blatchford*, 11 Wallace, 172; *Sewing Machine Case*, 18 Wallace, 553; *Ribon vs. Railroad Companies*, 16 Wallace, 446; *Knapp vs. Railroad*, 20 Wallace, 130; *Gardner vs. Brown*, 21 Wallace, 36; *Removal Cases*, 100 U. S. 457; *Barney vs. Latham*, 103 U. S. 205; *Evans vs. Faxon*, *ante*, 175; *Blake vs. McKim*, 103 U. S. 336.

MARY PRICE vs. REBECCA FOREMAN *et al.*

CIRCUIT COURT—SOUTHERN DISTRICT OF ILLINOIS—JULY, 1882.

1. REMOVAL OF CAUSE—PARTIES TO CONTROVERSY—WILLS.—If a will gives to the executors thereof a certain sum of money to be held in trust for a specific purpose, the executors are indispensable parties defendant in a suit to set aside the will; and such suit cannot be removed to the Federal Court regardless of their citizenship.

Motion by complainant to remand suit to the State Court.

The facts in this case were as follows:

Isaac Foreman died in St. Clair county, Illinois, having made his last will and testament, which was duly probated, and by which, in its first clause, was devised to his wife, Rebecca Foreman, certain personal property, absolutely, and also the homestead for life. By the second clause the defendants, Thomas, Peiper and Harrison, were appointed executors and trustees for the purpose thereinafter named. By the third clause, the executors were directed and empowered to sell and convey the whole of the testator's real and personal estate not thereinbefore disposed of, and convert the same into money. The fourth clause, after providing for the payment of the testator's just debts, gave and bequeathed to the executors the sum of $2,000 in trust, for the use and benefit of his daughter, Mary Price, during her natural life, to be safely loaned or invested, and the interest or profits thereof annually to be paid to her during her natural life; and after her death the interest or proceeds thereof to be paid annually for the maintenance and education of her child or children, and such principal sum to be paid to her child or

children when he, she or they became of age. Should the daughter die leaving no child or children, or should all of them die before arriving at full age, then the said sum of $2,000 was made payable, two-thirds thereof to the American Bible Society, and the remaining one-third to the Missionary Society of the Methodist Episcopal Church of the United States of America. The last clause gave and bequeathed the proceeds in money of all the real and personal estate not thereinbefore specifically devised, as follows: Two-thirds to the Bible Society, and the remaining one-third to the Missionary Society. After the death of the wife the executors were authorized and empowered to sell and convey the real estate so devised to her, the proceeds to be divided between the before-mentioned devisees in the proportions above indicated.

The widow renounced the provisions of the will in her favor, taking what was allowed her by the local statutes.

G. Koerner, for complainant.

Geo. B. Strong, for Bible and Missionary Societies.

HARLAN, J. (orally.)—The present suit was instituted by Mary Price, the daughter and only child of the decedent, for the purpose of obtaining a decree declaring the will not to be the true last will of the deceased. The sole ground upon which it is impeached is that the deceased was mentally incapable of making a will.

The complainant is, and was at the commencement of the action, a citizen of Illinois, as are, and were, the defendants, Rebecca Foreman (the widow) and the three executors, Thomas, Peiper and Harrison. The Bible Society and the Missionary Society, also defendants, are corporations of the state of New York.

The widow, having renounced the provisions of the will and taken what the statute allows her, can have no real interest in the result of the suit. She cannot be affected by its determination, and is to be deemed only a nominal party. What she has received cannot be increased or diminished, however this suit may result.

It is said that the executors are only clothed by the will with the power of sale, and have no such beneficial interest in the present controversy as makes it necessary, within the meaning of the adjudged cases, to inquire as to their citizenship. Passing by this suggestion, so far as it relates to the authority conferred upon the executors to sell the real and personal estate of the testator, and to pay over the proceeds of such sale to the corporations named in the will, it is clear that they hold different relations to the money ($2,000) bequeathed to them in trust, for the use and benefit of Mary Price during her life. The issue made by the complainant necessarily embraces the entire suit and all the defendants except the widow. The defendant executors and trustees and the foreign corporations are all indispensable parties. The issue made is, will or no will. As trustees for Mary Price (if not as executors, charged with certain duties and invested with authority to sell and convey certain property,) the defendants, Thomas, Peiper and Harrison, have a direct legal interest in opposition to complainant's claim that the testator was incompetent to make a will. There is, it is true, a controversy between the two foreign corporations and the complainant, but obviously it is not a controversy in which those parties alone are concerned, and which can be fully determined as between them without the presence of the other defendants in their capacity as trustees for complainant. The suit embraces a single, indivisable controversy,—will or no will—on one side of which is the complainant, a citizen of Illinois, and on the other side of which,

as indispensable parties defendant, are corporations of New York and citizens of Illinois. Upon the authority of *Blake vs. McKim*, 103 U. S. 338; *Barney vs. Latham*, Id. 205; *Removal Cases*, 100 U. S. 477; *Evans vs. Faxon*, *ante* 175; *Gardner vs. Brown*, 21 Wall. 36, and other cases, this cause must be remanded to the State Court for hearing. It is so ordered.

NORTHERN ILLINOIS COAL AND IRON COMPANY vs. HENRY L. YOUNG *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JULY, 1882.

IN EQUITY.

1. EQUITY PRACTICE.—An original bill in the nature of a bill of review for fraud may be filed as a matter of right, and without leave of court.

2. LIMITATION.—Such a bill filed to set aside a decree on the ground of fraud, may be filed at any time within five years from the entering of the decree.

3. CORPORATION—RIGHT TO FILE BILL.—Where the property sold under such decree belonged to a corporation, the bill to set aside the decree may be filed by the corporation, and not necessarily by its receiver, or by his authority.

Lawrence, Campbell & Lawrence and *J. R. Doolittle*, for complainant.

Mason Bros, for defendants.

HARLAN, J. (orally).—On the 15th of May, 1876, James L. Young, Mason Young and Henry L. Young, commenced in this court a suit for the foreclosure of a mortgage upon its property executed by the present complainant. A decree of sale was entered March 26, 1877, and an order requiring the master to sell the property to satisfy the mortgage debt was entered April 3, 1878. The sale occurred in 1878 and the deed to the purchasers (defendants here) was approved on the 27th of February, 1880.

This suit was commenced on November 7, 1881. The bill charges that the acts of the complainants in the foreclosure suit in obtaining the decree of sale, and in the conduct of the sale, was a fraud upon the court and upon the company; and that, for reasons set out in the bill at great length, the sale should be set aside. The prayer of the bill is that the foreclosure be declared fraudulent and void; that an account be taken of what, if anything, is due on the mortgage, and also of the rents and profits received during the foreclosure proceedings, to the end that it may be ascertained whether the mortgage debt has not been fully satisfied; that the complainant be permitted to redeem the property on payment of the amount due on the mortgage debt, which, it is alleged, complainant is ready to do; that the property be resold in separate parcels under a decree of this court and that the personal property be sold where it is located, and subject to the inspection of bidders.

The case is now submitted upon defendants' motion to dismiss the bill upon the following grounds: 1. It was filed without leave of the court first had for that purpose. 2. It was not filed by or with the authority of the receiver of the Northern Illinois Coal and Iron Company, appointed in the foreclosure suit, who alone, it is claimed, had the right to use the name of the company for the purposes of this suit.

3. The time within which such a bill could be filed had expired when this suit was commenced.

The motion to dismiss proceeds mainly upon the ground that this is a bill of review of the class which may not be filed without leave of the court. But this position, it seems to the court, cannot be sustained. The present bill, although possessing some of the characteristics of a bill of review, is, in its essential features, an original bill in the nature of a bill of review for fraud. It may be filed, as matter of right, and without leave of court: Story's Equity Pleadings, 8th edition, 426 and notes. This disposes of the question of limitation, since the suit was brought within five years from the decree of sale. That is the limitation in Illinois upon actions at law for damages, and by analogy the same limitation should be applied to original bills for fraud in obtaining a decree. And even that time may be enlarged when there has been fraudulent concealment of the facts and circumstances constituting the alleged fraud: Section 22, chapter 83, Illinois Revised Statutes.

The objection that this suit could not be brought in the name of the company without authority from the receiver in the foreclosure suit, is overruled. In so holding the court must not be understood as now passing upon the question raised by complainant's counsel, as to whether the original order appointing the receiver in the foreclosure proceedings was not void. The property sought to be redeemed is neither in the possession of the company nor of the receiver. The functions of the latter ceased when the proceedings in the suit terminated. If the right of redemption exists at all, it is proper that it should be asserted. If the receiver might have sued upon his own motion that right is not exclusive of the right of the corporation itself to sue and be sued. If it could not sue or be sued with reference to the property involved in the foreclosure suit, while that suit was pending,

there is no reason why, after its termination, the company might not, in apt time, and in its own name, without consulting the receiver, bring an original bill for fraud, to the end that it might recover its property and resume its business. Of course, the court does not mean to express any opinion upon the merits of the case, but only to dispose of the motion in the light of the allegations of the bill. The motion to dismiss is overruled.

FARMERS' LOAN AND TRUST COMPANY vs. GREEN BAY AND MINNESOTA RAILROAD COMPANY.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—JULY, 1882.

IN EQUITY.

1. CORPORATIONS—NEGLIGENCE—ULTRA VIRES—When damage is done to real estate held by a corporation, the party by whose negligence such injury was caused cannot escape responsibility by showing that the corporation was not permitted by its charter to acquire title to the property, or that it acquired it for purposes unauthorized by law.

2. TITLE—FRAUD.—Where land is donated to a railroad company, and the title is fraudulently taken by the officers of the company to themselves, the railroad company cannot maintain a suit to acquire the title, if by its own charter, it is forbidden to take and hold the lands.

Intervening petitions of the Scranton Manufacturing and Boom Company and the Dexterville Manufacturing and Boom Company, corporations created under the general laws

of Wisconsin, asserting claims against the receiver of the railroad company for damages done, from time to time, by fire, to certain lands by them respectively owned. The petitions in substance alleged that the lands were, in part, covered with pine forests, suitable for saw logs and other kinds of useful and valuable timber, and other portions thereof were what is commonly known as cranberry marshes and grass lands, and as such were valuable. The claims were rested upon the ground that the railroad which ran through the lands described, was, upon the part of the receiver and the employés, so carelessly and negligently operated, that coals and sparks of fire escaped from the passing locomotives, causing numerous fires upon the track and right of way upon which the receiver had carelessly and negligently allowed to be accumulated and remain a large quantity of combustible and inflammable material, dangerous to the adjoining property of the petitioners; also, that these fires were negligently permitted to spread and extend from the line of the railroad to and upon the lands of petitioners. It was alleged among other things that the locomotives used by the receiver were not properly constructed and repaired or provided with spark arresters, and were so negligently operated as to cause the fires to which reference has been made.

By an order entered on the 26th of July, 1881, these claims were referred to a special master for examination and report thereon. Upon the claims of each company the master made a report, allowing some and disallowing others. He found among other things that the Scranton Manufacturing and Boom Company sustained damages, by reason of fires, through the destruction of cranberry vines growing upon its lands, to the amount of $2,000; and that the Dexterville Manufacturing and Boom Company sustained damages from the same cause, and in like manner, to the

amount of $1,500. In each case his finding was that the fires were the result of negligence upon the part of the receiver, his agents and employés.

Upon exceptions to the master's reports, his findings were approved by the district judge. The present hearing was had before Mr. Justice HARLAN and Judge DYER, and counsel were permitted to re-argue only certain questions of law, viz:

First—Whether these corporations are permitted by their charters to acquire lands for the purpose of cultivating cranberry vines and with reference to their being so cultivated.

Second—If not, can they be heard to assert claims for damages done to such vines?

Counsel for the receiver maintained the negative of each of these propositions.

Albion Cate, G. C. Prentiss and *George H. Noyes*, for petitioners.

E. C. & W. C. Larned, for receiver.

HARLAN, J. (orally.)—The learned counsel for the receiver insist, with much confidence, that their position is sustained by a ruling heretofore made by this court in the case of *Timothy Case, receiver, etc., vs. D. M. Kelly.* Let us see what that case was. It there appeared that Kelly, Ketchum, and Hiles held the title to various tracts of land aggregating more than 400 acres, lying along and covering a part of the line of the Green Bay and Minnesota Railroad Company. The object of that suit was to obtain a decree compelling the defendants therein to surrender the title to those lands to the company or to its receiver. The ground upon which relief was asked was that the several tracts were in fact donations by the respective grantors to the railroad company with a view,

as well to aid in the construction of the road, as for the purpose of securing the location of depots, whereby the grantors expected to derive profit; that the defendants, in view of their official relations to the railroad at the time of the donations, as well as at the time the deeds were executed, were forbidden by law from taking title to themselves; that the taking of title to themselves, was under the circumstances a fraud as well upon the company as upon the grantors. It was found that Kelly and others had obtained title to the lands there in question under the circumstances charged; that is, that their grantors intended to make donations to the company, and that there was no purpose on their part, as Kelly and Ketchum well knew, to convey the title to them except as representatives of the company. The difficulty the court had in that case was as to the extent of the relief which could be given to the railroad company. The latter by its charter was made capable of acquiring for its legitimate use, for railroad purposes, a fee simple of lands, tenements, or easements in the same, and of conveying any such estate or interest. It was also authorized through its officers to enter upon land for the purpose of locating the route of its railroad, and, the route being located, to enter upon, take possession, occupy, and use any land along and including its line of road, not exceeding 100 feet in width, and, outside of its right-of-way, to take and occupy other lands which might be necessary for its use for the purpose of erecting depot buildings, stopping stages, station houses, freight houses, warehouses, engine houses, machine shops, or for buildings or fixtures of any kind, or grounds about such buildings, houses, or fixtures for the convenient operation of the business of the road. The company's charter further declared that all private property which it was authorized to take, was deemed to be taken for public use. It was held, that the company did not need and

could not use for railroad purposes but a small part of the land, the title to which Kelly and Ketchum had improperly taken to themselves; that it had no power to condemn property for any purpose except railroad purposes, and that it could not take the title to lands for merely speculative or farming purposes. It was consequently adjudged that the law would not aid the company to acquire title to land which it could not have condemned except for railroad purposes, and the title to which the company could not, consistently with its charter, have acquired. The duty of the court to withhold its aid in that direction was regarded none the less imperative, because the defendants had used their official relations with the company to acquire title in themselves. The court, however, recognized the company's right to relief as to such portion of each tract as was contiguous to its several depots, and necessary for its use for legitimate railroad objects, including right of way and depot grounds. To that end, and for that purpose, the cause was sent to a special master to take proof and report. This statement of what was decided in the Kelly suit is, we think, quite sufficient to show the inapplicability to the case in hand of the ruling then made. Now the contention of counsel is, that these manufacturing and boom companies could not lawfully acquire land for the purpose of maintaining and cultivating cranberry vines, and the court having ruled in the Kelly case that the law would not aid the railroad corporation to acquire land, the title to which it could not lawfully take and hold, must now, to be consistent, rule that the petitioning corporations having, as is claimed, acquired title to land for purposes foreign to the object of their creation, cannot recover damages for injuries to such land arising from the negligence of the receiver and his agents engaged in the operation of the railroad.

To this proposition the court cannot give its assent. It

cannot be sustained on principle or authority.[1] The cases cited by counsel do not justify the conclusion that a party, causing by his negligence injury to land, the title to which is held by a corporation, may be relieved from responsibility for damages by showing that the corporation did not legally acquire title to the land, or that the land is used for forbidden purposes. The proposition now presented is substantially negatived by what was said in the Kelly case. The court there said: "Had the several grantors made conveyances directly to the company, its title, although it may have been acquired in violation of its charter, could not have been questioned collaterally or otherwise than by the state in some appropriate proceeding for that purpose. The difference between the supposed case and the one now before us shows the inapplicability of the rule announced in *National Bank vs. Matthews* and the authorities there cited." So, here, if injury is done to real estate conveyed to and held by a corporation, the party by whose negligence such injury is caused, cannot be heard to say, in a collateral proceeding, and by way of defense to a suit for damages for such injury, that the corporation was not permitted by its charter to acquire title to the property, or that it has acquired it for purposes unauthorized by law. In considering this question, The court has not deemed it necessary to determine whether these manufacturing and boom corporations exceeded their authority in acquiring title to cranberry marsh lands valuable only or chiefly for the cultivation of cranberry vines; we mean only to decide that, even if they exceeded their authority in the respects named, that fact constitutes no defense to the present claims for damages.

[1] *National Bank vs. Matthews*, 98 U. S. 621; *National Bank vs. Whitney*, 103 U. S. 99; *Smith vs. Sheeley*, 12 Wallace, 358; *Mutual Life Insurance Company vs. Wilcox*, 8 Bissell, 203.

WILLIAM SMITH *et al.* vs. WILLIAM CRAFT *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—JULY, 1882.

1. INSOLVENT DEBTOR MAY IN GOOD FAITH PREFER A CREDITOR.—An insolvent debtor, in the absence of a bankrupt law, has the absolute control of his unincumbered property, and he may prefer one creditor to the exclusion of all others, whether that creditor's debt is or is not yet due. But while the motive which prompts the debtor thus to favor one creditor over another may not be material, it is essential to the validity of the transfer, that it be made in good faith, and solely in payment of an honest debt.

2. BARGAIN FOR PERSONAL ADVANTAGE RENDERS PREFERENCE VOID.—Any bargain for the personal advantage of the debtor over his other creditors—as an agreement to employ him in winding up the business and disposing of the property—as part consideration for the transfer, renders it illegal.

3. FRAUDULENT AGREEMENT FOR PREFERENCE.—An agreement between a debtor and one of his creditors, that if the creditor will loan him money, he will in case of his insolvency prefer such creditor, is in the nature of a secret lien, which is a fraud on the creditors who subsequently deal with the debtor without any knowledge thereof, and which will render as to them a subsequent transfer of all the debtor's property in accordance with such agreement, void.

4. EVIDENCE TO PROVE PREFERENCE VALID.—Where an insolvent debtor prefers one of his creditors by transfer of all his property, and other creditors file a bill attacking the validity of such preference and charging fraud and collusion, in order to sustain the preference the evidence should show the manner in which the debt arose for which the preference was given, specifying dates, amounts and consideration, and give in detail the amount of the property transferred and the proceeds thereof.

5. FRAUDULENT PREFERENCE—APPLICATION OF PROCEEDS OF PROPERTY—EQUITY RELIEF.—If a debtor has made a fraudulent transfer of all his property to one creditor, in preference, the fact that the proceeds of such property have been applied in payment of a *bona fide* debt due such creditor, will not prevent equity from interfering in behalf of other and judgment creditors to apply the proceeds of the property on their judgments.

6. RIGHT OF OTHER CREDITORS TO BECOME CO-COMPLAINANTS.—After the announcement of the finding of the court in favor of the complainants attacking the fraudulent preference, if other creditors come in and ask to be made parties to the suit as co-complainants, this may be done, but their claims will be postponed in favor of the original complainants.

Bill to set aside an insolvent debtor's preference on the ground of fraud, and to recover the proceeds of the property transferred.

Horace Speed, for complainants.

Rand & Taylor and *Baker, Hord & Hendricks*, for defendants.

GRESHAM, J.—The defendant Craft, who was a merchant at Indianapolis, on the 5th of April, 1879, executed to his co-defendant, Churchman, in trust for Fletcher and Churchman, a bill of sale, embracing his entire stock of watches, diamonds, jewelry and fixtures; also a lease upon the building in which he had carried on his business, one year of the term not having then expired. This was all the property that Craft owned, except his notes and accounts, which he estimated to be worth $1,000, and some real estate, which was incumbered for as much as it was worth.

Fletcher and Churchman were bankers, and as such, at different times, had loaned money to Craft, on his agreement, that if they would make the loans, and anything occurred by which he was unable to pay all his creditors, he would first pay or secure them.

It is recited in the bill of sale, that Craft is indebted to the bank in about the sum of $13,000, and that the sale is made in payment and satisfaction of this indebtedness, "and the further consideration, that said Churchman shall employ said Craft in said business at the rate of $150 per month, so

long as said Churchman shall carry on or continue said business."

Immediately after the execution of this instrument, Craft's employés were notified by Churchman and Craft, of the sale, and that thereafter the business would be carried on by Craft, as the agent of Fletcher and Churchman.

After this change, Craft conducted the business as agent, with his old force of employés, just as before the transfer, until some time in August, when, by direction of Fletcher and Churchman, he commenced selling the remainder of the goods at auction, and in this way the stock was finally disposed of some time in October.

During the time that Craft managed the business, he paid himself and his co-employés weekly out of the proceeds.

The complainants, the Middleton Plate Company, Keller & Untermeier, William Smith & Co., and Freund & Co., are eastern merchants and manufacturers, with whom Craft had been dealing for many years, and to whom he was indebted for goods purchased prior to the sale to Fletcher and Churchman.

After the sale and before the commencement of this suit, on the 27th of June, 1881, the complainants obtained judgments against Craft for the amounts respectively due them, upon which executions issued and returns were made of no property.

The bill charges that the goods which the complainants sold to Craft on time, and for which their several judgments were taken, were part of the stock sold to Fletcher and Churchman; that they divided the proceeds with Craft, and that the transfer was intended, by both Craft and Fletcher and Churchman, to hinder and delay the complainants and the other creditors of Craft.

Fletcher and Churchman, in their answer, deny all fraud, and aver that on the 27th of December, 1878, Craft was

indebted to them in the sum of $25,000, for which he gave his two notes, each for $12,500, payable in thirty and sixty days, and in the further sum of $7,313, that being the amount paid by them for Craft, at his request, in taking up a note which he had previously given to George F. McGinnis; that the sale by Craft to them was in good faith, and in full payment of his indebtedness; that they realized not more than $20,000 from the goods; that Craft got no part of the proceeds; that they have no knowledge that any of the goods purchased of either of the complainants, were in the stock at the time of the transfer; and that the sale to them was in good faith as preferred creditors, with no intention of cheating, hindering or delaying the complainants or other creditors.

Craft's answer denies that he received any part of the proceeds, denies all fraud, and avers that the sale was in good faith, in payment of an indebtedness which exceeded the value of the goods and fixtures and the unexpired lease.

Craft's credit seems to have been good with the complainants up to the time of his failure, and yet, it appears from the evidence, that he was insolvent early in 1878. The judgments taken by the complainants were for goods sold after this time, and mostly within a few months before the sale to Fletcher and Churchman. The last purchase from Keller & Untermeier, amounting to $876 was as late as the 26th of March, and only ten days before the transfer.

It is probable that these goods were part of the stock sold to Fletcher and Churchman. That they got some of the goods purchased from the complainants, which had not been paid for, is clear enough. Craft swears that in the spring of 1878, and from that time until his final failure, he had the confidence of a sanguine business man, that he would be able to keep up and pay all his debts, and I am satisfied that during this period, he made payments to the complainants.

Fletcher and Churchman had been accommodating Craft with loans for a number of years. Churchman testifies that Craft always promised if the loans were made, and, from any cause, he was unable to pay all his debts, he would protect or secure Fletcher and Churchman.

The loans made from time to time (on the faith of these promises it is to be presumed) amounted in August, 1877, to as much as $20,000.

These loans, and others made after that time, were regularly renewed every ninety days, and the interest paid in advance at the rate of ten per cent. per annum, until the notes were given which matured on the 27th of December, 1878. At this time Craft's indebtedness from loans, both he and Churchman say, amounted to $25,000, for which Craft gave his two notes each for $12,500 payable in thirty and sixty days, instead of ninety days, as in all former renewals.

About this time, and perhaps the same day, Fletcher and Churchman paid for Craft the McGinnis note, which was indorsed by Churchman. Instead of taking Craft's note for the amount thus paid for him, Fletcher and Churchman simply held the canceled note, as evidence of its payment by them. Prior to December 27, 1878, Craft had always been required to renew his notes promptly at maturity. The two notes given on this day became due in thirty and sixty days as already stated, and they were allowed to remain due without renewal, until the sale on the 5th of April.

Craft is not able to explain why Fletcher and Churchman required these notes to be made in thirty and sixty days, instead of ninety days as in all former renewals, but supposes they had their own reasons for the change; he was not asked to renew these notes when they became due, and he requested no delay. But after thus testifying, he says he thinks

Fletcher and Churchman were waiting for him to make his annual invoice, on the 1st of April, before renewing again.

Churchman testifies that when these notes were executed, on the 27th of December, he was anxious to have the indebtedness reduced; that Craft said he would cease buying goods, and he had no doubt he could fix the notes up in thirty or sixty days, or sell enough goods in that time to reduce the amount he was owing, and that when these notes became due, he told Craft to let them stand, as they were in the hope that his sales would yet justify him in making some payments. Churchman gives no other reason for the change of time in the renewals, or for allowing them to stand after maturity until the transfer.

Craft completed his invoice on the 1st of April, which showed, that his stock and fixtures, amounted to "somewhere in the neighborhood of $33,000," exclusive of notes and accounts, which were estimated at "about $1,000."

Recognizing that he was in "deep water," he went to the office of his counsel, on the 5th of April, and directed him to make out papers for an assignment. Just what was done under this direction does not appear; but instead of making an assignment, Churchman was sent for, and arriving, was told that Craft had finished his inventory, could not pay all his debts, and was undecided as to what he had better do. Churchman then reminded Craft of his repeated promises, when he got the money, from time to time, that if he failed and became unable to pay all his debts, he would secure or prefer Fletcher and Churchman. Craft admitted that he had made these promises, and there and then the bill of sale was prepared and executed.

Churchman's information was, he says, that Craft was solvent, and he knew nothing to the contrary, until he was sent for when the transfer was made.

Craft testifies, that it was made because Fletcher and

Churchman had been his friends, and he felt it to be his duty to prefer them. Both Craft and Churchman testify, that the sale was in good faith, in payment of an honest debt, amounting to more than the property was worth. Neither Craft nor Churchman produced the inventory, and in speaking of it, Craft says it amounted to "somewhere in the neighborhood of $33,000," and Churchman says it amounted to "about $30,000."

It does not appear from the evidence, that Churchman saw the invoice before the transfer. It is not stated at what price the goods were invoiced, and although Craft deposited the proceeds daily with Fletcher and Churchman, and they kept an account with the store, neither witness is definite in speaking of the total or net amounts realized. They both think the net amount was "about $20,000." Craft is not able even to approximate the proportion of goods sold before the auction sales commenced in August, but thinks that probably half the stock was thus disposed of, and he is unable to tell what the auction sales amounted to, or at what reduction, if any, on the cost price, the goods were sold. There is no evidence as to the value of the lease.

While I have no doubt that Craft was indebted to Fletcher and Churchman, the true amount that was owing does not clearly appear from the pleadings and the evidence. It is true, both Craft and Churchman state that the McGinnis note of $7,313, with accrued interest from date, and the two $12,500 notes and interest after maturity, represented the true amount owing at the time of the transfer. But one of the special interrogatories required the respondents to state the amount of the indebtedness discharged by the sale, and the date and amount of each loan, if any were made, with date and amount of each renewal. In answer to this interrogatory Craft says that at the time of the sale he owed the two $12,500 notes, and the McGinnis note, with the interest

due on these notes. Although directly interrogated as to the original loans, their amounts, dates and renewals, the answer is silent on that subject. Churchman's answer to the same interrogatory, though in different language, is the same as Craft's. These answers were not prepared by the same counsel, and it is somewhat singular, to say the least, that both should be silent on the same point.

While testifying before the master, in answer to substantially the same inquiry, Craft says he got $7,000 November 17, 1876; $6,000 in February, 1877; $2,500 August 15, 1877; and $6,500 October 23, 1877. These loans, amounting to $22,000, are all that Craft is able to specify; but he says that sometimes he went into the bank and got loans which were not entered, and that he thinks he got $3,000 at some other time, as the total loans amounted to $25,000.

Craft and Churchman are the only witnesses that testified, and they were called by the complainants.

An insolvent debtor, in the absence of a bankrupt law, has the absolute control of his unincumbered property, and he may prefer one creditor to the exclusion of all others. The favored creditor's debt may or may not be due, and the preference may be by a judgment, a mortgage, a deed, a transfer of securities or choses in action, the sale of personal property, or the payment of money.

While the motive which prompts the debtor thus to favor a single creditor is not material, the transfer, to be valid, must be in good faith, and solely in payment of an honest debt. There must be no design to secure an advantage to the debtor over his other creditors, or to delay them in the collection of their debts. It does not follow that because a debtor may prefer such creditor or creditors as he pleases, that he may prefer them on such terms as he pleases.[1]

[1] *Grover vs. Wakeman*, 11 Wendell, 222.

Equity favors an equal distribution of a debtor's property amongst all his creditors, and it does not view with favor a transaction whereby a single creditor is preferred to the exclusion of all others. Craft and Churchman are vague and indefinite, when they should be certain and definite. They should state the different loans, specifying dates and amounts, including renewals, which constitute the consideration of the two $12,500 notes, the exact amount of the invoice, the amount realized from the goods, both before and after the auction sales commenced, and the gross and net amounts realized from all sales.

Craft had been insolvent for a year and a half, and perhaps longer, before the 27th of December, 1878. Churchman testifies that on the 7th of August, 1877, Craft's loans amounted to $20,000, after which time he paid the interest, but nothing on the principal.

The two $12,500 notes were the first and only renewals that were permitted to stand after maturity. After these notes were given, on the 27th of December, 1878, and after they became due, Craft continued to buy goods from the complainants on credit, part of which were in the stock at the time of the transfer.

Without saying that it was in the minds of Fletcher and Churchman and Craft, at the time the last renewals were given, or at any other time, that the latter should get goods East on credit and turn them over to the former in payment of their debt, I think the preference was fraudulent on other grounds. Fletcher and Churchman loaned money to Craft on the faith of his agreement to secure them to the exclusion of all others, if he became insolvent. The complainants, ignorant of this agreement, sold Craft goods on time, trusting to his skill, energy and integrity. They would not have done this, it is safe to assume, if they had known

of the agreement to prefer Fletcher and Churchman at all hazards.

These agreements were in the nature of secret liens, which the law will not allow to be enforced against Craft's other creditors. Fletcher and Churchman seem to have been on friendly and confidential relations with Craft, and I have no doubt they knew he was buying goods East on time, after the last renewals were given, as well as before. They assisted him in maintaining a credit to which he was not entitled, and now claim the proceeds of the entire stock against the injured and deluded creditors.

If the right of preference may be exercised as the parties exercised it in this case, the law affords ample opportunity for a failing debtor to get the property of one person, and use it in paying the debt of another.[1]

A further objection to the sale is that the property was not taken absolutely and unconditionally in payment of Fletcher and Churchman's debt, as a preference. It was a scheme, in part at least, to secure to Craft a personal benefit against his other creditors. Fletcher and Churchman got the lease, and they were to continue the business at the old stand; and as part of the consideration of the transfer, Craft was to be employed as their agent and superintendent, at a salary of $150 per month for an indefinite period. During the seven months that he acted as agent, he retained $1,050 out of the proceeds of the stock for wages.

Why this agreement in advance to employ Craft at a fixed salary, unless he was unwilling to make the preference on any other terms? If he exacted these terms as the condition on which he would make the sale, it was clearly not made for

[1] *Grover vs. Wakeman, supra*; *Boardman vs. Halliday*, 10 Paige, 223; *Biggs vs. Murray*, 2 Johnson, Ch. 565; *Nicholson vs. Leavitt*, 4 Sanford, 252.

the honest and sole purpose of paying Fletcher and Churchman.

It is evident that Craft bargained for and secured a personal benefit or advantage over the complainants, while some of the goods which they had sold him on credit were yet on hand as part of the stock, or that Fletcher and Churchman tempted him to make the preference by offering to employ him as stated.

If the employment of Craft had been subsequent to the sale, instead of before it and part of the consideration of it, and the preference had been otherwise free from objection, other creditors would have had no right to complain, for they would have sustained no legal injury.

If it be admitted, and I do not think it can, that an insolvent debtor may make the best arrangement in his power with his creditors, preferring those who offer the best terms, then all creditors should have an equal chance to bid for the assets.

It is urged for Fletcher and Churchman (1) that, admitting the sale to them to have been fraudulent in fact, the proceeds have been applied as a preference in payment of an honest debt, and equity will not interfere; and (2) that the sale being at most only constructively fraudulent, they had a right to hold the property as a security for their debt, and therefore they are entitled to the proceeds.

The first of these propositions is unsound, both in law and in morals. One or more creditors of an insolvent debtor, are not allowed to take his property, by a fraudulent arrangement, convert it into money, and because the debtor had a right to make an honest preference, defy the other creditors.

If a debtor make a voluntary assignment, which is afterward set aside as fraudulent, the acts of the assignee performed in good faith, in the execution of the trust, will not be disturbed. He will not be held to account for the property

or its proceeds, which have been paid out by him in good faith to the creditors. This is the law, whether the assignment be fraudulent in fact or only constructively so.[1]

And when the sale is not tainted with actual fraud, but is fraudulent merely by construction of law, it is sometimes allowed to stand as a security for the grantee or vendee.[2]

But when a fraudulent scheme or purchase, by which a creditor gets the property of an insolvent debtor, is set aside in a suit brought by another creditor against the fraudulent grantee or vendee, he will not be allowed to share with the plaintiffs in the proceeds of the property.[3]

No general rule can be laid down applicable to all cases of fraudulent sales, assignments and preferences.

The relief granted in a given case depends largely on the facts of that case. "Equity" say the court, in *Clements vs. Moore*, 6 Wallace, 312, "looks at all the facts, and giving to each one its due weight, deals with the subject before it, according to its own ideas of right and justice. In some instances it visits the buyer with the same consequences which would have followed in a court of law."

The complainants, before bringing this suit, obtained judgments on their claims against Craft, and executions were issued, upon which there were returns of no property. If the property had remained in the hands of the respondents until the bill was filed, the complainants would have acquired a lien on it to the exclusion of other creditors, and they had a right to pursue the proceeds in Fletcher and Churchman's hands with the same result. The aggregate amount of the

[1] *Wakeman vs. Grover*, 4 Paige, 23; *Ames vs. Blunt*, 5 Paige, 13.

[2] *Tripp vs. Vincent*, 8 Paige, 176; *Weeden vs. Hawes*, 10 Conn. 50; Bump on Fraudulent Conveyances, 597.

[3] *Wilson vs. Horr*, 15 Iowa, 489; *Riggs vs. Murray*, 2 Johnson's Ch. 582; *Harris vs. Sumner*, 2 Pick. 129.

judgments is less than $20,000, and Fletcher and Churchman admit, that they realized as much from the goods.

I hold on the facts in this case, that the complainants are entitled to a decree against Fletcher and Churchman for the full amount of their judgments.

Since the court's finding announced for the complainants, other creditors have asked to be made parties to the suit as co-complainants. This may be done, but these creditors will be postponed in favor of the complainants.

A clause or provision in an assignment for the benefit of creditors, by which any benefit or advantage is reserved to the debtor at the expense of the creditors, whether such benefit be temporary or permanent, in the shape of payment of a gross or annual sum, employment at a compensation, or otherwise, and whether reserved to the debtor himself, or for the support of his family,—renders the assignment fraudulent in law, and void. *Harris vs. Sumner*, 2 Pick. 129; *Mackie vs. Cairns*, Hopkins, 373, 5 Cowen, 547; *McAllister vs Marshall*, 6 Binney, 338; *McClurg vs Lecky*, 3 Penrose & Watts, 83; *Currie vs. Hart*, 2 Sandf. Ch. 353; *Spence vs. Bagwell*, 6 Grattan, 444; Burrill on Assignments, 2 ed. 179.

So a stipulation in an assignment that the creditors shall release the debtor, as a condition of receiving the benefit of the assignment is generally held to render the assignment fraudulent and void. *Hyslop vs. Clarke*, 14 Johns. 458; *Austin vs Bell*, 20 Johns. 442; *Seaving vs. Brinkerhoff*, 5 Johns. Ch. 329; *Wakeman vs. Grover*, 4 Paige 23; *Grover vs. Wakeman*, 11 Wendell 187; *Atkinson vs. Jordan*, 5 Ohio, 178; *Woolsey vs. Urner*, Wright, (Ohio Ch.) 606; *Barret vs. Reids*, Id. 701; *Hafner vs. Irwin*, 1 Iredell (Law) 490; *Robins vs. Embry*, 1 Smeds & Marshall, Ch. 208; *Brown vs. Knox*, 6 Mo. 302; *Drake vs. Rogers*, *Id.* 317; *Miller vs Conklin*, 17 Geo. 430; *Ingraham vs Wheeler*, 6 Conn. 277; *Howell vs. Edgar*, 2 Scam. 417; *Ramsdell vs. Sigerson*, 2 Gilman, 78; *Henderson vs. Bliss*, 8 Ind. 100; *West vs. Snodgrass*, 17 Ala. 549; *Duggan vs. Bliss*, 4 Col. 223; *Hubbard vs. McNaughton*, 43 Mich. 220.

But in some cases it has been held that an assignment containing such a provision for a release, is valid. *Halsey vs. Whitney*, 4 Mason, 206; *Pearpoint vs. Graham*, 4 Wash. C. C. 232; *Brashear vs. West*, 7 Peters. 608; *Cheever vs. Imlay*, 7 Serg. & Rawle, 510; *Mechanics' Bank vs. Gorman*, 8 Watts & Serg. 304; *Livingston vs. Bell*, 3 Watts, 198; *Lea's Appeal*, 9 Barr. 504; *Kevan vs. Branch*, 1 Grattan, 274; *Le Prince vs. Guillemot*, 1 Richardson, Eq. 187. [*Reporter.*

SINGER ROCKING CHAIR COMPANY vs. TOBY FURNITURE COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—AUGUST, 1882.

IN EQUITY.

1. PATENTS—STATIONARY ROCKING CHAIR.—The first claim of the patent issued to Charles Singer, July 6, 1869, for an improvement in the construction of rocking chairs, cannot be sustained in view of the state of the art, and is void.

2. ROCKING CHAIR PATENTS—MECHANICAL CHANGE.—A rocking chair constructed to move upon a stationary platform having a base or rails upon which the rockers move, the base being tongued and the rockers grooved so that the one fits into the other, the ends of the base being elevated so as to prevent the rockers from working off, with flexible rubber bands connecting the rockers to the rails of the stand to prevent the seat from moving back and forth on the rails or rocking too far either way, is a mere mechanical change from chairs in previous use, and is not patentable.

Banning & Banning and *Offield & Towle*, for complainant.

Coburn & Thacher, for defendant.

Before DRUMMOND and DYER, JJ.

DRUMMOND, J.—There are nine suits by the same plaintiff against different defendants, two of which have been brought in the Circuit Court of the United States for the Eastern District of Wisconsin, and the remaining suits in this court. They are all founded on an alleged infringement

of a patent issued to Charles Singer, July 6, 1869, for an improvement in the construction of rocking chairs.

The patent contains two claims. The second relates to a device by which a current of air is produced, which, by the act of rocking, is impelled through a flexible tube so as to be carried to any part of the person seated in the chair. That claim is not in controversy here and need not be further considered. The rocking chair is one constructed to move upon a stationary platform, and not upon the floor. The platform has a base or rail upon which the rockers move, the latter being curved in the usual form. The base or rail is tongued, and the bottom of the rockers grooved so that the one fits into the other, and the ends of the base (or rails, as the patent calls them) are elevated so as to prevent the rockers from working off. The base or rails are "A" shaped, or of other form upon which the rockers are fitted, the latter being provided with "V" grooves or otherwise adapted to the rail, and projecting but a short distance below the seat. "The rockers may be connected to the rails of the stand by flexible bands in passing over studs projecting from the sides of each, to prevent the seat from moving back and forth on the rails, or rocking too far either way. These bands may be slipped off the studs when the chair is to be taken apart for packing." The first claim, which is the only one said to be infringed, is as follows: "The stand A, having rails B, the seat c′ and rockers C fitted to the said rails, and the elastic bands M, combined and arranged substantially as specified."

Having thus stated in what that part of the Singer machine consists, which is the subject of controversy here, the question naturally presents itself, in what respect it was new and the subject of a patent. The movement of a rocking chair on a stationary platform instead of rockers moving on the floor, was not the invention of Singer. That device had been

used before. In a general sense it was contained in the patent of Samuel Simmons, of December 21, 1819, and particularly in the patent of Samuel H. Bean, of March 31, 1840. Bean states that the principal feature of his invention consisted in making the seat and stool, as he calls it, of the chair in two parts, so that while the stool remains stationary the seat was made to rock on rockers. The base or rail on which the rockers moved in his chair were smooth, but there was a flange on the outside of each rocker similar to that on the inside of the wheel of a railroad car and which he calls guards, which prevented the seat from having any lateral movement. There were certain hanging metallic plates whose upper ends were suspended from the inside of the seat frame by pins, the object of which was to prevent the seat from being thrown off the stool. Without referring now to some of the other patented improved rocking chairs which have been set up by the defense, it is clear that Singer found a platform or stool with a chair on rockers, moving on the rails or base of the stool, with flanges on one side of the rockers to prevent lateral displacement, and also with a device to prevent the seat and the rockers from being thrown off the stool. Now what did he add to or change as to this part of his patent? He tongued the rails or base, and elevated them at the ends of the grooved rockers, instead of making flanges on the outside of each, thus fitting the rockers to the rails or base, and he attached an elastic band to the platform on each side of the stand. With a rocker attached to an ordinary chair, moving on a rail or platform base, as existed in Bean's chair, tongueing and grooving the rocker and the base and elevating the latter at each end, would seem to be no more than a mere mechanical change. In that case, all that is left would be simply the fact that an elastic vertical band is attached to the two parts of the structure to prevent the chair from being thrown off the platform; and the elas-

tic band is nothing more than a mechanical device to accomplish the object named. But in any view of the subject it seems clear that the patent, if it could be sustained for the particular manner in which the chair is constructed, namely: "The stand A, having rails B; the seat c', and rockers C fitted *to the said rails*, and the elastic bands M, combined and arranged as specified," then the chairs constructed by the defendants do not come within the specified descriptions here contained, and so would not infringe the plaintiff's patent. But we prefer to place our opinion upon broader grounds, and to say that, fairly construing the device here in question as set forth in the specifications, there was nothing in this device that entitled Singer to a patent.

UNITED STATES vs. SMITH WHITTIER.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—AUGUST, 1882.

FEDERAL PRACTICE—WRIT OF ERROR IN CRIMINAL CASE—STAY OF PROCEEDINGS.—The Circuit Court will grant a writ of error to the District Court in a criminal case, and also allow a stay of proceedings, where the error complained of is a matter about which there may be a serious question, in order to allow the defendant to take the deliberate judgment of the appellate court upon the question involved in the case.

Joseph B. Leake, U. S. District Attorney, for the United States.

Lyman Trumbull, for defendant.

United States vs. Whittier.

DRUMMOND, J.—This is an application to the Circuit Court for a writ of error, with an order for a stay of proceedings on a judgment and sentence by the District Court for the imprisonment of the defendant in the penitentiary at Chester for the term of three years. The offense charged in the indictment was that the defendant deposited in the post office a notice which gave information to the persons named in the indictment where an article for the prevention of conception could be obtained, contrary to section 3893 of the Revised Statutes, as amended by the act of July 12, 1876. The record shows that on the 15th of June, 1882, the defendant, in person, and by his attorney, together with the district attorney and a jury, appeared in court, and that the evidence in the case was concluded, and the arguments of counsel heard, and the instructions of the court given to the jury, "and the jury thereupon retired to consider their verdict; and, after a short absence, the jury returned into court in the absence of the defendant and his attorney, the following verdict, viz: 'We, the jury, find the defendant guilty;' and, on motion of the district attorney, it is ordered that the marshal take the defendant into custody." It is further shown by the record that the defendant had previously entered into a recognizance for his appearance in court from time to time, and was under recognizance at the time of the trial. On the same day the verdict was rendered, the defendant came into court and entered into a recognizance to appear before the court from day to day during that term, and also from day to day, and from term to term, to answer any order which the court might make in the case, and not depart without leave of the court. It does not appear how long the interval was between the rendition of the verdict and the time when this recognizance was entered into. On the 24th day of June, 1882, the defendant appeared in court personally and by his counsel, and moved the court for a new trial, which, after ar-

gument, was overruled by the court, and thereupon the sentence of the court already mentioned was passed upon the defendant. The grounds of the motion for a new trial are not stated, nor does it appear whether an objection was or was not taken because of the absence of the defendant and his counsel when the verdict was received.

The only difficulty about this case is whether the defendant is entitled to an order for a stay of proceedings. The statute of 1879 does not make it obligatory on the Circuit Court to grant a writ of error to the District Court in a criminal case; but the court, in favor of the rights of the citizen, would always feel inclined to be liberal in the construction of that part of the statute; and, although the view of the court might be that the judgment and sentence of the District Court were right, still, unless it was a case entirely free from doubt, the court would grant a writ of error. But obviously it was the intention of the statute to give an absolutely legal discretion to the court, or to the judge, whether the writ of error should operate as a stay of proceedings. It seems to me that the true rule upon the subject is this: If the error complained of is a matter about which there may be a serious question, it is the duty of the court, or of the judge, not only to grant the writ of error, but allow a stay of proceedings, to enable the defendant to take the deliberate judgment of the appellate court upon the question involved in the case. The only question of any importance, as I consider it, arises from the statement of the record that the defendant and his counsel were both absent at the time the verdict of the jury was rendered. They were present at the conclusion of the trial, when the evidence was finished, and when the instructions of the court were given to the jury. They then both absented themselves, for what reason and how long the record does not show. Now, the point is not, as I think, what may be the inclination of the mind of the circuit judge as to the

error assigned, but whether there may be a question about which there is a doubt, and as to which the defendant has a right to take the opinion of the appellate court. There is a conflict in the authorities. Some of the authorities which have been cited state that, this being a misdemeanor only, the court had the right to receive the verdict of the jury in the absence of the defendant. I think the counsel of the defendant is perhaps correct in saying there is no case which states that in the absence of both the defendant and his counsel a verdict is properly receivable. I cannot see that there is much distinction in principle upon this point. On a trial for felony at common law the verdict of the jury could not be rendered in the absence of the defendant. We have no clear distinction in many of the criminal statutes of the states, between felony and misdemeanor; but there is no doubt this offense, though called a misdemeanor by the statute, is a grave one, because the punishment for the commission of the offense may be a fine of $5,000 and ten years' imprisonment, and the sentence was three years in the penitentiary. The punishment, therefore, is very serious, and whatever may be my own view, at this time, of the error assigned upon the record, I think the defendant is entitled to take the opinion, after full argument, of the appellate court upon the question.

I would add, as an additional reason for this conclusion, that the case comes before me now only on a petition for a writ of error, with a request to grant a stay of proceedings. It is quite possible that I may not finally hear this case, and though I might now have an opinion on the case, as another judge may take a different view of it, I think I ought to give the defendant a stay of proceedings. Again, the case may be heard by two judges of the Circuit Court, and there may be a difference of opinion, possibly, between them, and the case be certified to the Supreme Court of the United States,

and the defendant would then have a right to take the opinion of the court of last resort upon the question.

In view of all these considerations, and for these reasons, I feel inclined not only to grant a writ of error, but a stay of proceedings in the case, and it is so ordered.

This case is still pending in the Circuit Court. [*Reporter.*

GEORGE C. RAY, Receiver, etc., vs. CHARLES B. KNOWLTON.

Circuit Court—District of Indiana—October, 1882.

Marshal's Fees Payable in Advance.—The Marshal has the right to demand the payment of fees for the service of process in advance.

Claypool & Ketcham, for plaintiff.

Charles S. Holstein, United States District Attorney, for the Marshal.

Gresham, J.—The usual process was issued in this case, directed to the marshal, commanding him to summon the defendant. The marshal refuses to serve the process until the proper fees are paid in advance or a deposit of money made for their security. A rule is asked against the marshal to show cause why he should not be punished for contempt for his refusal to serve the process.

In settling his accounts with the proper accounting officers

of the Treasury Department, the marshal is charged with all fees earned by him, and from the amount thus earned he is allowed to retain for his personal compensation over and above the necessary expenses of his office, including clerk hire and the amount allowed his deputies, any sum remaining not exceeding $6,000. If any excess remains over and above the credits allowed by law he is required to pay it into the treasury, whether the fees earned have been collected or not.

The marshal is therefore a public officer charged with the duty of collecting funds for the United States, and when he is required to serve process (not in suits where the United States requires the service) he has a right to demand the payment of the proper fees in advance of the service performed. He need not wait to take the chances of collecting them on an execution. See United States Revised Statutes, sections 841 to 846, inclusive.

WILLIAM KING *et al.* vs. OHIO & MISSISSIPPI RAILWAY COMPANY.

CIRCUIT COURT—DISTRICT OF INDIANA—OCTOBER, 1882.

1. LIABILITY OF MASTER FOR NEGLIGENCE OF FELLOW-SERVANT—STATEMENT OF RULE.—The rule in the Federal courts is that the master is only released from liability for injuries occurring to one servant through the negligence of his fellow-servant, when the servants are engaged in the same department of duty; and such immunity does not extend to cases where the servants are engaged in departments essentially foreign to each other.

2. RAILROAD COMPANY MUST PROVIDE SAFE ROLLING STOCK—LIABILITY TO EMPLOYE.—Railroad companies are bound to use due care in seeing that their cars and other rolling stock are maintained in a reasonably safe condition, and when an employé, in the proper discharge of his duty, is injured from the failure of the company to perform this personal duty, it is liable.

3. CORPORATIONS are held to the same personal responsibility as natural persons, for the negligent acts of its agents or employés.

4. NEGLIGENCE OF CAR INSPECTOR IS THAT OF THE COMPANY.—The negligence of the car inspector in failing to detect unsafe rolling stock, in case of injury to a brakeman resulting therefrom, is to be construed as the negligence of the railroad company, and not as that of a fellow-servant.

5. BRAKEMEN MAY ASSUME THAT CARS ARE IN ORDER.—A brakeman on a railroad has a right to assume without inspection that the cars he is required to couple are in a proper state of repair for handling, and it is not negligence on his part to rush in between two cars to make the coupling without stopping to see if the bumpers are all right.

Petition of Henry F. Braning to recover damages for injuries sustained in coupling cars, at North Vernon, Indiana, while in the service of the receiver.

The petitioner and others, on the 5th day of January, 1880, were making up a freight train at Indianapolis, to go south over the Louisville branch of the O. & M. Railway. He was

assisting as brakeman in switching and coupling, and finally ran along with the train as it backed up to a coal car, and hurriedly stepped in between this car and the rear car of the train, when they were three or four feet apart, to make the coupling. Instead of meeting or bumping together, as they should have done, the draw bars passed each other and allowed the ends of the cars to come together, or so near together as to seriously injure the petitioner. The strip which supported the draw-bar of the coal car and held it up, had become unbolted at one end, the nut being missing, and the draw-bar was thus allowed to drop far enough below its proper position to miss the draw-bar of the forward car and pass under it. There was some evidence tending to show that the "deadwood," which is a block bolted on the end of the car, above the draw-bar, to assist in keeping the cars from coming together, was imperfect, it being worn away as much as a few inches. If the coal car had not been out of repair the draw-bars would have met or bumped instead of passing, and the coupling would have been made without injury to the petitioner.

This coal car, which belonged to the company, and had been in use for nine years, was, it appears from the evidence, brought from Washington, Indiana, loaded with coal, the evening or the night before the accident. The car inspector, at Washington, testified that he had inspected all cars on leaving that place, the day before the accident, and none of them, so far as he observed, were out of repair, and three of the four car inspectors at Seymour testified that they had inspected all trains passing there from the West, the same day and the night of that day, two performing the labor together during the day, and the third alone at night, and that the cars all seemed to be in proper condition.

There was no car inspector at North Vernon, at this time, but one appears to have been appointed for that place some

months later. This appointment was made, however, it is claimed for the receiver, on account of the great increase of business at this point, after the accident.

There is no evidence that the coal car or any other cars were inspected at North Vernon. The petitioner testified he did not notice the condition of the coal car until he ran in and took hold of the link to make the coupling, and that he did not discover his peril until it was too late to escape. He was caught between the ends of the cars when they came together, and seriously injured in his right hand and chest. The physician who was called in after the accident, and who treated the petitioner for some time afterward, testified that he found a depression of at least two inches on the right side, the ribs from the fifth down, on that side, being forced in that far; that he did not succeed by manipulation and bandaging in entirely removing the depression; that the right lung and the membrane surrounding it were seriously injured; that some months after the accident he thought, on examination, that he found an accumulation of pus in the lower part of the right lung, corresponding to the place of injury, and tubercular deposits in the top of this lung; that the petitioner was not able to work, and the chances were that he never would be. During the year prior to the accident the petitioner had an attack of lung fever, from which he seemed to recover, and again went to work. He was a man of average health and strength, and there was no evidence that he had inherited any tendency to lung disease. Nine or ten weeks ofter receiving the injury he undertook to resume work on the road; but owing to his feeble condition he was compelled to rest at frequent intervals, sometimes for a week or longer. At the time his testimony was taken, which was two years or more after the accident, he was unable to work. It was not denied that his injuries were serious, very painful, and perhaps permanent. It was urged for the receiver, that the testimony

failed to show want of proper care on his part, or that of his managing agents; that if any carelessness was shown, it was the carelessness of the car inspectors, who should have discovered the damaged condition of the car before the accident, and ordered it into the shops for repairs; that the petitioner was compensated by his wages for his services, and all risks incident to his employment, including the carelessness of the car inspectors, who were his fellow-servants; and, finally, that the petitioner, by his own negligence, contributed to his injury by running in between the cars to make the coupling without using his eyes and discovering in time the dangerous condition of the coal car.

It is one hundred miles from Washington, where the coal car was loaded, to North Vernon, and from Seymour to the same place the distance is only fifteen miles.

John A. Henry, for petitioner.

Harrison, Hines & Miller, for receiver.

GRESHAM, J.—It is not denied that the coal car was out of repair and unfit for use at the time of the accident, and in view of its then condition, it is probable that the defects already described existed when the car passed Seymour, and even when it was loaded at Washington. These defects, when the car was detached, were plainly visible on examination, but when it was coupled up in a train and the draw-bar thus somewhat held in position, they were more liable to escape observation. But whatever the condition of this car may have been at Washington and Seymour, trains were made up at North Vernon, where the defective car was switched off on a side track to go south over the Louisville branch, and if proper care had been used at this point, its

damaged condition would have been discovered, and it would have been condemned for repairs instead of having been ordered into the train as it was.

It is not the law in the Federal Courts, nor is it believed to be the law in all of the State Courts, that the master is released from responsibility in all cases in which a servant is injured by the negligence of a fellow-servant. The master's immunity is limited to cases where the servants are engaged in the same common employment; that is to say, in the same department of duty. Such immunity does not extend to cases where the servants are engaged in departments essentially foreign to each other. A servant cannot be held to have contemplated, in the adjustment of his wages, those dangers which arise from the carelessness of fellow-servants, without any reference whatever to the nature of their employment or duties.[1] But without further discussion of the question of the master's immunity, I prefer to rest the decision on other grounds.

It is his duty to furnish his employés with proper machinery or instrumentalities, for their use in the work assigned them, and to see to it that the same are kept in a reasonably safe condition, or in reasonable repair. He may intrust this duty to others, but he cannot by so doing escape responsibility for its negligent non-performance. The acts of his agents in this regard are his acts—their negligence is his negligence. This rule applies to individuals, and there is no good reason for exempting railroad and other corporations from its operation. It is true that corporations can act only by their agents, but that is no reason for not holding them to the same personal responsibility as natural persons. Conduct which amounts

[1] *Hough vs. Railway Company*, 10 Otto, 213; *The Indianapolis & St. Louis Railroad Company vs. Morganstern*, Chicago Legal News, October 7, 1882, vol. 15, page 27.

to personal negligence as against an individual, should and does, amount to the same thing against a corporation acting by its proper officers or agents. Railroad companies are bound to use due care in seeing that their cars and other rolling stock are maintained in a reasonably safe condition; and when an employé—a brakeman, for instance—in the proper discharge of his duty is injured, from a failure on the the part of the company to perform this personal duty, it is liable.[1]

The master is bound to protect the servant, not against all risks, but against risks which could be avoided by the exercise of reasonable care on the part of the master. The brakeman's employment exposes him to constant peril under the most favorable conditions. He is expected and required to act with dispatch in coupling and uncoupling cars, and when he is negligently required by the proper officers or agents to handle cars out of repair, unfit for use and dangerous, and in doing so is injured, perhaps for life, without fault on his part, he should in justice have a remedy against his employer.

This road and all its possessions were in the hands of a receiver, who was operating it at the time of the accident. He, of course sustained to the petitioner the relation of master, and the neglect of his proper agent or agents to condemn the coal car and keep it out of use until repaired, was his neglect—for which he is liable.

It does not appear from the evidence that the petitioner knew the coal car was out of repair when he ran in, as he was accustomed to do, and as brakemen usually do, to make the coupling, or that, without stopping and looking be-

[1] *Hough vs. Railway Company, supra*; *Railroad Company vs. Fort*, 17 Wallace, 557; *Dillon vs. U. P. Railroad Company*, 3 Dillon, 319; *Ford vs. Railroad Company*, 110 Massachusetts, 241; *Gibson vs. Pacific Railroad Company*, 46 Missouri, 163.

fore running in, he might have seen that it was unfit for use. He testified that he discovered for the first time, when he was between the cars, and when it was too late to escape, that the draw-bars would not meet. Knowing that promptness in the discharge of his duties not only recommended him to his employer, but that it was required of him, the petitioner had a right to assume without inspection, as he no doubt did, that the cars he was required to couple were in a proper state of repair for handling. It cannot be said from the evidence that the petitioner acted recklessly or that he failed to use due care for his own preservation, and thus contributed to the injury. He earned $45 a month at his business before the accident, he is now thirty-one years old, and he seems to have been industrious. His injuries were such that he is not expected to recover. It is fair to assume that he will never be able to perform active labor.

I allow him damages in the sum of $4,000, including medicines, medical and board bills, and expenses of nursing.

The ordinary risks and perils of the service in which he voluntarily engages are taken by the servant upon himself; and these include all such risks as arise from the negligence of those of his fellow-servants who are engaged in the same department of the master's general business, and who are not superiors in authority: *Kielley vs. Belcher, etc., Mining Co.*, 3 Sawy. 437.

The rule is well settled both in this country and England, that a servant cannot recover from his master for injuries caused by the negligence of a fellow-servant; but on the question as to who are fellow-servants within the meaning of the rule, the authorities are irreconcilable. Thus in some of the courts it has been held that the rule was not applicable to the case of a servant who, at the time of injury, was under the general direction and control of another who was intrusted with duties of a higher grade, and from whose negligence the injury resulted: *Whaalan vs. Mad River, etc., R. Co.*, 8 Ohio St. 249; *Berea Stone Co. vs. Kraft*, 31 Ohio St. 287; *Railroad Co. vs. Fort*, 17 Wall. 553 (affirming *s. c.* 2 Dill. 259); *Mann vs. Oriental Print Works*, 11 R. I. 152; *Cooper vs. Iowa Central R. Co.*, 44 Iowa, 134; *Cook vs. Hannibal, etc., R. Co.*, 63 Mo. 397; *Toledo, etc., R. R. Co. vs. Ingraham*, 77 Ills. 309; *Cowles vs. Richmond & Danvill R. R. Co.*, 84 N. C. 309; *L. S. & M. S. Ry. Co. vs. Lavalley*, 36 Ohio

St. 221; *Schultz vs. C. M. & St. P. Ry. Co.*, 48 Wis. 375. So it has been held that a "section boss" on a railroad is not a fellow-servant with one of the men working under him: *Louisville, etc., R. Co. vs. Bowler*, 9 Heisk. 866; and see *Nashville, etc.. R. Co. vs. Jones*, 9 Heisk. 27; *Chicago, etc., R. Co. vs. Bayfield*, 37 Mich. 205; *Lalor vs. Chicago, etc., R. Co.*, 52 Ills. 401; *Houston, etc., Ry. Co. vs. Dunham*, 49 Texas, 181. But by some of the courts it has been decided that the fact that the negligent servant is superior in his grade of employment to the servant injured, does not take the case out of the rule, and by these courts a mere *foreman* of work is regarded as a fellow-servant with those under his control: *O'Connell vs. Baltimore, etc., R. Co.*, 20 Md. 212; *McGowan vs. St. Louis, etc., R. Co.*, 61 Mo. 528; *Columbus, etc., R. Co., vs. Arnold*, 31 Ind. 174; *Shauck vs. Northern, etc., R. Co.*, 25 Md. 462; *O'Connor vs. Roberts*, 120 Mass. 227; *Lehigh Valley Coal Co. vs. Jones*, 86 Pa. St. 432; *Lawler vs. Androsvoggin R. Co.*, 62 Me. 463; *Marshall vs. Schricker*, 63 Mo. 308; *Summersell vs. Fish*, 117 Mass. 312; *Zeigler vs. Day*, 123 Mass. 152; *Malone vs. Hathaway*, 64 N. Y. 5; *Howells vs. Landore Seimens Steel Co.*, L. R. 10 Q. B. 62; *s. c.* 44 L. J. (Q. B.) 25; *Gallagher vs. Piper*, 16 C. B. (N. S.) 669; *Murphy vs. Smith*, 19 C. B. (N. S.) 361; *Collier vs. Steinhardt*, 51 Cal. 116; *McLean vs. Blue Point Gravel Min. Co., Id.* 255; *Mullen vs. Steamship Co.*, 9 Phil. (Pa.) 16; *Hamilton vs. Iron Mountain Co.*, 4 Mo. App. 564; *Eagan vs. Tucker*, 18 Hun, 347; *Barringer vs. D. & H. Canal Co.*, 19 Hun, 216; *D. & H. Canal Co. vs. Carroll*, 89 Pa. St. 374; *Crispin vs. Babbitt*, 81 N. Y. 516. In one case it was said that fellow-servant includes all who serve the same master, work under the same control, deriving authority and compensation from the same source, and are engaged in the same general business, though in different grades and departments of it: *Wonder vs. Baltimore, etc., R. R. Co.*, 32 Md. 411; S. C. 3 Am. Rep. 143; *Killea vs. Faxon*, 125 Mass. 485; *Walker vs. Boston, etc., R. R. Co.*, 128 Mass. 8; *Gibson vs. Northern Central Ry. Co.*, 22 Hun, 289; *Dana vs. N. Y. Central, etc., R. R. Co.*, 23 Hun, 473; *Gormley vs. O. & M. Ry. Co.*, 72 Ind. 31; *Quincy Mining Co. vs. Kitts*, 42 Mich. 34. But the duties of two servants of the same master may be so entirely distinct and disconnected from each other that the rule will not apply. Thus in Illinois it has been held that an engineer on a railway locomotive is not in the same common employment with a laborer in the company's carpenter shop: *Ryan vs. Chicago, etc., R. Co.*, 60 Ills. 171; *Louisville, etc., R. Co. vs. Collins*, 2 Duv. 114. And if the servants of a common master are employed in different departments and not associated with each other in the performance of their duties, some of the courts hold that the master cannot escape liability under the rule: *Toledo, etc., R. R. Co. vs. O'Connor*, 77 Ills. 391; *C. & N. W. Ry. Co., vs. Moranda*, 93 Ills. 302; *Vautrain vs. St. Louis, etc., Ry. Co.*, 8 Mo. App. 538; *Drymola vs. Thompson*, 26 Minn. 40. [*Reporter.*

CHARLES G. FINNEY *et al.* vs. THE GRAND TRUNK RAILWAY COMPANY.

DISTRICT COURT—NORTHERN DISTRICT OF ILLINOIS—OCTOBER, 1882.

1. ADMIRALTY—CHARTER OF VESSEL—KNOWLEDGE OF COURSE OF BUSINESS AT PORT OF DESTINATION PRESUMED.—A party making a charter of his vessel to carry a cargo to a certain port, must be presumed to know the course of business at the port of destination, and if there is only one elevator at such port where the cargo can be unloaded, it will be presumed that he made his contract with that fact in view.

2. DEMURRAGE—ONE ELEVATOR AT PORT.—And if the vessel is delayed for several days at the port of destination because other vessels which have arrived there ahead of her, are in turn unloading at the one elevator, there is no liability for demurrage for the delay so caused.

This is a libel for damages by the owners of the schooner George C. Finney, by reason of alleged unreasonable delay in the discharge of the cargo of the schooner at Goderich or Sarnia.

The undisputed facts were that the schooner was chartered in the city of Chicago, on October 18, 1880, to carry a cargo of corn to Goderich, Canada. She took on her cargo and sailed the day after she was chartered, which was October 19. Her bill of lading showed a shipment of 20,055 bushels of corn at the port of Chicago, to be transported to Goderich, and there delivered "for account of G. P. Comstock & Co.," "in care of the Grand Trunk Railway Co." No promise was made for any special time in which the cargo was to be discharged, nor was there any clause in the bill of lading requiring dispatch in discharging. The schooner arrived at Goderich on the morning of October 23d, and her captain reported that he was ready to begin unloading that morning, but he

was told that there were five other vessels ahead of him, and he must wait his turn. The Grand Trunk Railway had only one elevator at Goderich, and it took until the afternoon of October 30th to unload the five vessels which had arrived, and reported ahead of the Finney. On the afternoon of the 30th they began unloading the Finney, but owing to rough weather, they were unable to fully discharge her cargo till about noon of the 1st of November.

W. H. Condon, for libellant.

Waite & Clark, for respondent.

BLODGETT, J.—I think there can be no doubt of the statement that she was unloaded as soon as it was practicable to do so at the Grand Trunk elevator, giving the precedence to the vessels which had arrived ahead of her with cargoes consigned to the same elevator. The only question in the case is whether the schooner was obliged to await her turn to be unloaded, and whether, there being no stipulation that she should be unloaded within any special time, nor for quick dispatch, her owners can recover for the delay as unreasonable.

The parties to the charter must be presumed to have been acquainted with the course of business at the port of destination. It must be assumed that the libellant, or those acting for him in making the charter of his vessel, knew that there was only one elevator belonging to the Grand Trunk Railway Company at Goderich, and that this cargo which he contracted to deliver to the care of that railway company must be unloaded at this elevator.

It also appears from the proof that libellant and his agent, through whom the charter was made, was aware of the fact that other vessels had been chartered for the same port, one

of which was owned by libellant, and had sailed only few days before the charter of the Finney. So that he must have known that other vessels were ahead of the Finney, and that she could not be unloaded until after they were, if she arrived after they did. In other words, he must be held to have known that his schooner must be unloaded at the Grand Trunk Elevator; that she must wait until vessels which had arrived before her were unloaded; and he knew that others had been chartered and sailed in advance of him, and might possibly, if not probably, have the right to be unloaded ahead of the Finney. This view seems to be fully sustained by the Supreme Court of the United States in *The Convoy's Wheat*, 3 Wallace, 225, and also in *Cross vs. Beard*, 26 N. Y. 91; *The Glover*, 1st Brown, 167; Abbott on Shipping, 311; *Henly vs. Brooklyn Ice Co.*, 6 Benedict, 471.

There is no proof that the schooner was not unloaded as soon as she could be if she was required to await her turn at the elevator. True, there was one day after the unloading commenced in which they were unable to work on account of the weather, the wind blowing from such a direction as to cause so much sea at the elevator as to make it impossible to work the machinery. This was a sufficient cause for the delay which intervened between the beginning and completion of the unloading.

The further point was made by the defense that the respondent, not being the owner of the cargo of the schooner, but only a carrier who was to transport it by rail from Goderich to its final destination, is not liable in this action for demurrage; but with the view I take of the law upon the admitted facts I do not deem it necessary to pass on that question.

The finding of the court will be that the respondent was not in fault, and the libel is dismissed for want of equity.

THE UNION MUTUAL LIFE INSURACE COMPANY vs. FRANCIS M. DICE *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—NOVEMBER, 1882.

IN EQUITY.

STATUTE OF LIMITATIONS—RECOVERY OF LANDS SOLD FOR TAXES—EQUITY JURISDICTION.—The statute of Indiana having provided that no action for the recovery of real property sold for taxes, shall lie unless brought within five years from such sale, a bill in equity cannot be maintained after the lapse of five years from a tax sale, to set aside the sale and quiet title to the land, although during a portion of the five years a decree was in force, (which was rendered by default against the complainant in this second suit and on its motion was subsequently set aside,) declaring and quieting the title to such lands in the defendants to such bill.

Bill to quiet title to certain lands and to cancel a tax sale thereof. The lands described in the bill of complaint, were sold to the respondents, Francis M. Dice and James Long, for non-payment of taxes, and after the lapse of two years, without redemption, the proper officer executed a deed to the purchasers. Prior to the sale the owner had executed to the complainant a mortgage on these lands to secure a loan. This mortgage was foreclosed after the tax sale, Dice and Long not being made parties; and at the foreclosure sale the complainant became the purchaser, and in due time received a deed. Sometime after both this deed and the tax deed had been executed, suit was commenced in one of the State Courts against the complainant by the respondents to quiet their title to the premises. The only notice that was given of the pendency of this suit was by publication. The complainant was defaulted, and a decree was entered against it, quieting the title in the respondents. Subse-

quently the complainant appeared in the State Court, and in a proper proceeding under the code, had this decree vacated. Including the time the decree of the State Court was in force, more than five years elapsed after the tax sale before this suit was brought, but excluding that time the suit was brought within five years.

The bill in this case alleged that the tax sale was illegal, because the owner of the lands at the time, had abundant personal property in the county, out of which the taxes might have been made, and that no demand or other effort was made to make such taxes out of such property; that the tax assessment was excessive; that the respondents have been in possession of the premises since the sale, and that the rents and profits exceed the amount of taxes paid by the respondents since their purchase. The prayer is for an accounting, and a decree quieting the title in the complainant. In their plea, the respondents averred that at the time of the tax sale, the owner of the premises was a non-resident of the state, owning no personal property within it; that they have been in possession of the lands uninterruptedly since their purchase, and that this suit was not brought within five years of the tax sale, relying upon a statute of the state which reads as follows: "No action for the recovery of real property, sold for the non-payment of taxes, shall lie, unless the same be brought within five years after the date of the sale thereof for taxes as aforesaid, anything in the statute of limitations to the contrary notwithstanding." 1 Davis' Revised Statutes of Indiana, chapter 22, section 250, page 127.

Claypool & Ketcham, for complainant.

Calkins & Harris, for defendants.

GRESHAM, J.—A debtor who procures and keeps in force an injunction against the collection of a debt which he ought to pay, until it is barred at law by the statute of limitations, will not be allowed to avail himself of the bar in a court of equity. A party, who, by unfounded and protracted litigation, has been prevented from asserting his legal rights in a court of law, until the statute of limitations has run against him, is not remediless in a court of equity.[1]

But Dice and Long were purchasers at a public sale; there was nothing fraudulent in their purchase, and it cannot be said that they were bound to notify the owner of the lands, or his mortgagee, of their claim or title. The premises might have been redeemed at any time within two years after the tax sale, by paying the delinquent taxes, damages, etc. Why this was not done does not appear from the bill, nor does it appear upon what ground the decree of the State Court, quieting the title in Dice and Long, was vacated. It may have been, and likely was, on the ground that the complainant was a foreign corporation, and had no actual notice of the pendency of the suit. The parties were all before the State Court when the complainant appeared and had the decree set aside. This was less than five years after the tax sale. There was nothing to prevent the complainant from asserting in that suit, by cross-bill, the same right that is asserted here. It cannot be said, that the bringing of the suit into the State Court, and the taking of the decree and allowing it to stand in force without personal notice to the Insurance Company, was a fraud upon that company.

The rule in equity is, that as soon as a party has a right to apply to a court of equity for relief, the statute begins to run against him.[2]

[1] *Wilkinson vs. Flowers*, 37 Mississippi, 579; Story's Equity Jurisprudence, section 1521.

[2] Story's Equity Jurisprudence, section 1521 a.

The statute above quoted commenced to run at once after the sale, and by its terms the purchaser can bring no suit for possession after the lapse of five years from the time of sale, nor can the owner question the validity of the sale after that time.

Any suit affecting the title is a suit for recovering the property, within the meaning of the statute.[1]

The plea is sustained.

UNITED STATES vs. JAMES D. SPRAGUE *et al.*

DISTRICT COURT—EASTERN DISTRICT OF WISCONSIN—NOVEMBER, 1882.

1. FRAUDULENT BOND.—A bond resembling a United States bond, but unexecuted, is not an "obligation or other security" within the meaning of §5430, R. S., and an indictment for having it in possession cannot be sustained under that section.

2. DEGREE OF SIMILITUDE REQUIRED.—To constitute the offense, it is not necessary that the fraudulent bond should purport to be an obligation of the United States, or that the similitude should be such as to deceive experts or cautious men; it is sufficient that it be calculated to deceive an honest, sensible and unsuspecting man of ordinary observation and care, dealing with a man supposed to be honest.

Motion for new trial.

G. W. Hazelton, District Attorney, for United States.

N. S. Murphey, for defendants.

---

[1] *Barrett vs. Love*, 48 Iowa, 108.

DYER, J.—The defendants have been convicted under section 5430 of the Revised Statutes, of the offense of having in their possession an obligation engraved and printed after the similitude of an obligation issued under the authority of the United States, with intent to sell or otherwise use the same. A motion for a new trial has been argued and is now to be decided.

It was shown on the trial by the testimony of a bank expert that the instrument which the defendants had in their possession and attempted to exchange for money, resembles in color, style of printing and engraving, and in general appearance a 5-20 Government bond. The same witness testified that in form and size it differs from a genuine Government bond, and, in fact, examination of the instrument shows that it purports to be, not an obligation of the United States, but an obligation of the United States Silver Mining Company, of Denver city, Col., by which that company acknowledges itself to be indebted to the bearer in the sum of $1000, payable at the American Exchange National Bank, in the city of New York, March 1, 1890, with interest at 7 per cent. On the face of the instrument is printed in large gilt letters the word "gold," and interest coupons, payable semi-annually, are annexed. At the foot of the bond and of each coupon are printed the words "Pres't" and "Sec'y" with spaces left before each of those words for signatures; but no signatures are written or printed in the spaces thus left for the purpose, so that on the face of the paper it appears to be an unexecuted instrument.

On the trial the court held that to constitute the offense declared in the statute referred to, it was not essential that the fraudulent or fictitious obligation should in terms purport to be an obligation of the United States. And following the ruling, as here produced in manuscript, of Judge CALDWELL, of the Eastern District of Arkansas, in *United States vs.*

Wilson, understood to be unreported, the court charged the jury that "to constitute an offense under the statute, it is not necessary that the similitude between the false and the true security should be such as to deceive experts, bank officers or cautious men. It is sufficient if the alleged fraudulent bond bears such a likeness or resemblance to one of the genuine bonds of the United States as to be calculated to deceive an honest, sensible and unsuspecting man of ordinary observation and care, dealing with a man supposed to be honest. If it does, then the similitude required by law to make out the offense, exists." The court further charged the jury, that where the similitude is of the character stated, the offense is not disproved by showing that the alleged fraudulent bond bears no signature, or that careful examination discloses that it does not purport to be a bond of the United States, but that on the contrary it purports to be a bond issued by some mining company. There was clearly no error in holding that to constitute the offense it is not essential that the fraudulent bond or instrument should on its face purport to be an obligation of the United States. The language of the clause in section 5430, upon which the indictment is based, is that every person "who has in his possession or custody, except under authority from the Secretary of the Treasury or other proper officer, any obligation or other security engraved and printed after the similitude of any obligation or other security issued under the authority of the United States, with intent to sell or otherwise use the same," shall be punished, etc.

The object of this statute evidently was to make it unlawful for any person to have in his possession without proper authority and with intent to sell or otherwise use the same, any obligation or security, whether purporting to be but not in fact issued under the authority of the United States, or purporting to be or in fact made or issued by any individual

or any public or private corporation, engraved and printed after the similitude of a genuine obligation or security of the United States. No other construction of the statute is consistent with its language and evident meaning. The serious question involved is, must not the instrument claimed to be made after the similitude of a Government obligation or security, be in fact or purport to be an executed obligation or security, to make a case within the statute?

Of course, the defendants cannot be prosecuted in this court on the ground that they are confidence men, or that they have attempted to perpetrate a fraud. Their prosecution must proceed wholly under this statute, and their conviction must rest wholly upon proof of the charge that they unlawfully had in their possession an obligation made after the similitude of an obligation of the United States. As we have seen, the words of the statute are that every person who has in his possession "any obligation or other security," etc. The words "obligation or other security," as here used, seem clearly to imply an executed instrument, or at least one which on its face purports to be executed by somebody. In the case in hand the false or bogus bond bears no signatures whatever. It is a mere blank so far as signatures or execution are concerned. Can it then be said to be an obligation or security, or to be even a pretended obligation or security? True, it is a paper made after the similitude of a United States bond, but it is unexecuted, unsigned by anybody; in that regard, as just observed, it is a blank, and there is not on its face even a pretense of execution by any person or corporation.

The statute was aimed at the issue or execution, whether real or pretended, of obligations or securities made after the similitude of the obligations or securities of the United States; and I am constrained to believe that what is meant by the language of the section referred to, is an instrument

that is either in fact executed or purports to be executed by somebody. Otherwise it is not and does not purport to be an obligation. Very forcible argument was made by the learned district attorney that the instrument in question, though bearing no signature, may be as effectually used for the purposes of deception and fraud, as in case it purported to be executed or signed. This may be so, but after all the court cannot supply omissions in the statute, but must accept and construe the statute as we find it; and if the case in hand does not come within the letter and meaning of the statute, it is the duty of the court so to decide. The instrument in evidence is not an obligation or other security and does not purport to be such, because it was never executed or signed by anybody, and therefore it is not such an instrument as the statute covers. In that respect it is no more than a blank piece of paper.

It was also argued by the district attorney that the fact that the instrument in evidence was not signed or executed, should be treated by the court as merely a fact entering into the principal question of similitude to be submitted to the jury; and as the jury have found that the alleged similitude exists notwithstanding the absence of such signatures as would make the instrument either an actual or pretended obligation, the court cannot disturb the verdict. In other words, the contention is that the non-execution of the instrument or paper is merely a fact bearing upon the question of similitude; and that it is the province of the jury alone to say in the light of all the facts whether the alleged similitude exists or not. This was the view to which the court was inclined when the question first arose; and in support of the proposition thus stated, counsel have cited the *United States vs. Morrow*, 4 Wash. C. C. 733. That case, however, only holds that in a case of forged coins the question of resemblance or similitude is one for the jury, and this no one

will dispute. But when a statute, as in the present case, declares in effect that the false instrument must be an obligation or security, it cannot be that because the question of similitude is one for the jury, the court is not to determine whether the case made is within the statute. Whether the instrument is an obligation or not, is a question as to its legal effect. That is a question for the court, and if it is apparent that the alleged fraudulent obligation or security is not an obligation or security at all, within the meaning of the statute, it must follow that the conviction cannot be sustained, although the jury have determined that the paper in evidence in its body and general form and style, is made after the similitude of a United States bond. The case of the *People vs. Ah Sam*, 41 Cal. 645, was referred to on the argument, but it is inapplicable to the case at bar. In that case the defendant was indicted for having in his possession blank and unfinished bank bills in the form and similitude of a bill for the payment of money, with intent to fill up and complete the same; and the statute under which the indictment was found, declared it to be an offense to have in possession blanks having the form or similitude of bills for the payment of money, etc. On the whole, my opinion is that the conviction of the defendants cannot be sustained. They undoubtedly attempted to commit a gross fraud; but the statutory offense of which this court has jurisdiction, is not established. The difficulty in the way of maintaining a conviction, is attributable to a defect in the statute, and that defect Congress alone can remedy.

Motion for new trial granted.

A person may be convicted of passing or attempting to pass an imperfect imitation of Federal coin with a guilty intent: *U. S. vs. Bricker*, 8 Phila. 426. But if the spurious coin from its incompleteness or the defectiveness of its manufacture be not fitted to deceive persons of ordinary caution and intelligence, the inference of a criminal intent in making

it does not arise: *U. S. vs. Burns*, 5 McLean, 23; *U. S. vs. Morrow*, 4 Wash. C. C. 733.

It has been held indictable to attempt to utter a spurious note of the Bank of the United States purporting to be signed by the officers thereof, though the persons whose signatures were forged were not officers of the bank: *U. S. vs. Turner*, 7 Peters, 132.

And it is not necessary that the note, if genuine, would be valid, or if on its face it purports to be good. So passing a note on a bank which has no existence is within the law: *U. S. vs. Mitchell*, Bald. 366.

A person who passes pieces of metal, apparently gold, octagon in form, on one side of which is the device of an Indian, and on the other the inscription "¼ dollar, Cal.," cannot be convicted of a crime, under section 5461, of the Revised Statutes. That section does not extend to the uttering of a token which does not purport to be an imitation or in substitution of any coin known to the law: *United States vs. Bogart*, 9 Ben. 314.

[*Reporter.*

JOSEPH G. HUBBELL *et al.* vs. AMBROSE D. DeLAND.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—NOVEMBER, 1882.

IN EQUITY.

1. RE-ISSUED PATENT—PLEADING—SPECIAL PLEA.—A plea interposed to a bill in chancery to restrain the infringment of a re-issued patent, setting up that the original patent and the re-issue were for different devices or inventions, and that the claim in the re-issue was unlawfully expanded so as to embrace improvements covered by other patents, issued subsequent to the original and prior to the re-issued patent, and therefore that the re-issue is void, is properly filed. Such allegations are proper matter for a special plea.

2. RES JUDICATA.—In such case, if the plea is overruled the defendant cannot again make the same defense by way of answer under rules 84 and 89, in equity.

3. Many cases cited and discussed; *Sharp vs. Reissner*, distinguished.

On motion to strike plea from files.

Duell & Hey, for complainants.

Finches, Lynde & Miller, for defendant.

DYER, J.—On the 13th day of April, 1869, letters patent No. 88,830 for an improvement in the manufacture of cheese, were issued to J. W. Andrews and N. J. Ogden of the state of New York. On the 3d day of November, 1874, re-issue letters patent No. 6,117 were issued to the plaintiff Hubbell as the assignee by *mesne* assignments of Andrews and Ogden, and the bill in this case is filed to restrain the infringment of said re-issue letters patent, and for an account.

To this bill the defendant has interposed a plea which avers that the original patent issued to Andrews and Ogden, was not for the same invention as that described in the re-issue; that the original patent "was for a mechanical device or a combination of certain materials used in the manufacture of cheese, while the re-issue upon which the suit is brought, does not claim to be for said combination, but is for molding the cheese within the bandage cloth in contradistinction to applying a bandage after the formation of the cheese, substantially as and for the purposes set forth."

The original and re-issue patents with their specifications and claims, are set out *in hæc verba* in the plea. It is also averred in the plea, that on the 21st day of March, 1871, a patent numbered 112,977 was issued to William Sternberg and that on the 9th day of January, 1872, a patent numbered 122,520 was issued to Milton B. Fraser; both of which

patents were for an improvement in cheese hoops, and are also set out in full in the plea.

The plea concludes with the averment that the original patent to Andrews and Ogden "was limited to the particular combination of mechanical devices shown, and composing the apparatus described in said specifications; that said re-issue patent abandons the claim in the original patent, and claims the process of molding the cheese within the bandage, thereby expanding the claim so as to cover all subsequent improvements, and monopolizes a process not covered by the original patent and which was in general use; therefore this defendant doth plead in bar to the said complainant's bill, that said re-issue patent No. 6,117, was issued in violation of the statute and is not for the same invention as the original patent, and if said process is disclosed in the employment of the devices described in the original patent and not claimed therein, the same process being described and made use of by other inventors in subsequent patents before said re-issue, said re-issue is void."

A motion is now made by counsel for the plaintiffs, that the plea be stricken from the files as improperly interposed, or that it be ordered to stand as an answer to the bill. The ground of the motion is, that a defense which impeaches the validity of a patent cannot be specially pleaded, but must be set up in the form of an answer.

Authorities are cited in support of the motion which it seems necessary to notice. In *Birdsall vs. Perrigo*, 5 Blatch. 251, the patentee of a machine granted an exclusive right under his patent, to make and sell machines in a given territory, for a specified fee to be paid to him for each machine made and sold, and brought a suit against his grantee to recover fees due and unpaid for machines made and sold. The defendant pleaded specially, first, that the plaintiff had infringed such exclusive right, and secondly, that the plain-

tiff was not the first and original inventor of what his patent claimed. The pleas were demurred to and it was held that they were bad on demurrer. The ground taken in the decision was that the plea that the plaintiff had infringed the defendant's exclusive right, was not a defense to an action for the recovery of a sum agreed to be paid as a license fee for machines which the plea admitted were made and sold by the defendant; and further, that the defense set up in this plea was in effect, recoupment, and that recoupment is a matter never pleaded in bar, citing *Nichols vs. Dusenbury*, 2 Comstock, 283, 286. As to the plea that the plaintiff was not the first inventor of what his patent claimed, it was held, that as the plea alleged no fraud on the part of the plaintiff, and no express warranty, and did not allege that the defendant had been disturbed in the enjoyment of the exclusive right transferred to him, by any paramount title, and did not aver even the existence of any such paramount title, nor a re-transfer of his alleged right, it constituted no defense to an action to recover license fees due for machines admitted to have been actually sold by the defendant. The statement of the case shows that it has no application to the question presented in the case at bar, which is one of practice involving the right of the defendant to file the plea in question.

In *Wilder vs. Gayler*, 1 Blatch. 597, it was held, that where the defendant in a patent suit pleaded the general issue and special pleas, and also gave a notice of special matter under section 15 of the Patent Act of July 4, 1836, 5 U. S. Statutes at Large, 123, and the matters set forth in the special pleas were those of which notice might have been given under said section 15, the special pleas should be stricken out. The pleas are not set forth in the report of the case, but the general ground of the decision seems to have been that a defendant in a patent suit could not plead specially as a defense, matters which the act of 1836 required

him to specify in a notice in connection with a plea of the general issue. But this ruling appears to have been in conflict with the rule laid down by the Supreme Court in *Evans vs. Eaton*, 3 Wheat. 454, where it was held as stated by BETTS, J., in *Day vs. The New England Car Spring Co.*, 3 Blatch. 181, "that in actions at law for the infringement of patent rights, a defendant is not limited in his defense, to the plea of the general issue allowed by the statute, even if his defense rests upon matters which the statute authorizes to be given in evidence under the general issue, but that he may, at his option, plead those particulars specially."

In *Evans vs. Eaton*, *supra*, p. 504, it was said by the court: "It has been already observed that the notice is substituted for a special plea; it is further to be observed, that it is a substitute to which the defendant is not obliged to resort. The notice is to be given only when it is intended to offer the special matter in evidence on the general issue. The defendant is not obliged to pursue this course. He may still plead specially and then the plea is the only notice which the plaintiff can claim."

If then, in actions at law, the defendant could plead specially the matters which under section 15 of the act of 1836 he might give in evidence under a plea of the general issue and notice, it would seem to follow that the same course of procedure can be taken in such actions under section 4950 of the present Revised Statutes.

In *Day vs. New England Car Spring Company*, *supra*, which was an action on the case for the infringement of a patent brought by the assignee of the patentee, the defendant, with the general issue without any notice of special matter, pleaded special pleas setting up a license under the patentee paramount to the right of the plaintiff; and it was held that the special pleas were well pleaded and could not be stricken out on motion. As will be observed, all the cases

referred to were actions at law; but *Sharp vs. Reissner*, 20 Off. Gaz. 1161, was an action in equity, and it was held in that case by Judge BLATCHFORD, that a special plea to the bill averring that the defendants had not made, constructed, used or vended to others to be used, the invention described in the patent, and denying infringement of the patent in any manner whatever, was not allowable, and that the issue of infringement ought to be tried under an answer and not under a plea. This authority is much relied on in support of the present motion, but I am of the opinion that it is inapplicable. The special plea in that case was little more than a mere denial of infringement. It brought forward no new matter displacing the equity of the bill. Argument can hardly be needed to show that the question of the infringement of a patent is not the proper subject of a special plea. As Judge BLATCHFORD says in his opinion, the question of the infringement of a patent depends very much on the construction of its claims, and that depends very much on prior patents on the same subject, and if such prior patents are to be put in, they ought to be set up in an answer and be put in once for all. And in that case it appeared by affidavit of the defendants, that if their plea should be overruled, they would desire by answer to put in prior patents to limit the scope of the plaintiffs' patent so as to render infringment impossible; thus proposing to litigate the question of infringement first by plea, and failing in that, then by answer. Undoubtedly this case was well decided, but it does not, in my opinion, rule the case at bar.

Here it is proposed under a special plea to litigate the single question of the validity of the re-issue patent; its validity being questioned on the ground that it appears by comparison of the original and re-issue that the latter patent was for one thing and the former for another; that the claim in the re-issue was unlawfully expanded so as to embrace

improvements covered by other patents issued after the issuance of the plaintiffs' original patent and before the re-issue, and therefore that the re-issue is void. Why is not this a matter of defense that may be presented by special plea? It was argued that if the plea shall be overruled, the defendant will be at liberty under rules 34 and 39 in equity to again make the same defense by answer. I do not so construe those rules. The question at issue now, will then have been adjudicated. Upon overruling the plea, the defendant, it is true, would be ruled to answer the bill, but it does not follow that the matters litigated under the plea could be renewed in a defense made by answer. If the plea shall be sustained, that will be the end of the suit; and "whatever shows that there is no right which can be made the subject of suit, or whatever is a complete and perpetual bar to the right sued for, may constitute the subject of a plea in bar; or as it is expressed in a work on Pleadings at Law, 'whatever destroys the plaintiffs' suit, and disables him forever from recovering, may be pleaded in bar.'" 1 Daniel's Chy. Practice, p. 638.

In *Bailey vs. Le Roy*, 2 Edw. Chy. Rep. 514, it was held that when a bill sets forth a contract in writing, alleged to be signed by the defendant or his authorized agent, a plea of the statute, averring that there is no writing subscribed by the party or his authorized agent is inadmissible, because it is merely denying what is alleged in the bill and brings forward no new facts in opposition, which is the proper office of a plea. If a denial merely be intended, it must be by way of answer. This was the state of the case in *Sharp vs. Reissner*, *supra*. There the plea merely negatived certain allegations of the bill. It brought forward no new fact in opposition; or in the language of the court in *Black vs. Black*, 15 Geo. 448, it presented no new matter displacing the equity of the bill.

In the case at bar, the plea brings forward new matter in opposition to the equity of the bill—matter which, if true, destroys the plaintiffs' suit and disables them from recovery.

The motion to strike the plea from the files is denied, and the plaintiffs have leave to set down the plea for argument or to take issue on the plea, as they may elect, within thirty days.

FREDERICK L. GOSS *et al.* vs. DANIEL R. CAMERON *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1882.

IN EQUITY.

1. PATENT NO. 229,998 FOR IMPROVEMENTS IN PRINTING PRESSES, LIMITED—DIAGONAL CHROMATIC PRINTING.—The first claim of patent No. 229,998, issued January 10, 1880, for "Improvements in feeding attachments for printing press," which is broadly for the method of printing or shading illuminated cards diagonally, by feeding the sheets diagonally into the presses, and arranging the form in a corresponding diagonal position, can only be sustained so far as the result is accomplished by the special instrumentalities shown in the patent.

2. SAME.—Such patent cannot be sustained for diagonal printing as a result, nor can it be extended to cover the mere mode of working a common printing press when no material changes are made in its mechanism, the working position of some of its movable parts only being changed.

3. SECOND CLAIM OF PATENT—COMBINATION—MECHANICAL ADAPTATION—INFRINGEMENT.—The mechanical adaptation of a cylinder chromatic printing press which is arranged to do square printing, so that it will print diagonally, does not require invention, and cannot be an in-

fringement of second claim of complainant's patent, which is limited to the use of the whole combination therein described, or known substitutes therefor.

E. F. Warner and *H. Harrison*, for complainants.

West & Bond, for defendants.

BLODGETT, J.—This is a suit to enjoin infringement of Patent No. 229,998, issued July 13, 1880, to complainants for "Improvements in feeding attachments for Printing Presses," and for an accounting.

In their specifications the inventors say: "The object of the invention is to provide means for printing illuminated matter in such manner that the stripes or bars of color shall extend diagonally across the card or sheet printed upon, and to that end the invention consists in feeding the cards or sheets in a novel manner and in arranging the form correspondingly.

The diagonal color printing in question is accomplished by placing the form diagonally upon the bed or plate of the printing press at whatever angle it may be wished to have the stripes or bars of color run across the face of the sheet to be printed, and then feeding the sheets to be printed onto the cylinder diagonally, so that they will register with the form, and the diagonal feeding of the sheets is secured by so arranging the nippers that they will seize and hold the sheet by one corner instead of the edge, or end, as is done in square printing. To make the nippers perform the function of holding the sheet by the corner, two longer nippers than those adapted to square printing, are placed upon the nipper-shaft and so arranged that they will seize upon the corner of the sheet in such a way as not to interfere with the portion of the sheet to be printed or colored; that is, they are only to take hold of the corner and the edges of the sheet.

The claims of the patent, which it is insisted the defendants infringe, are as follows:

First—"The method substantially as hereinabove described of printing or shading illuminated cards, or sheets, diagonally, and by feeding the cards or sheets diagonally into the press by arranging the form in a correspondingly diagonal position as specified."

Second—"The combination with the feed board and impression cylinder of the printing press, of the nippers F F, each successively longer than the others, and having their working ends in a line extending diagonally across the cylinder, and of the extensible vibratory guides G G, whereby the sheets or cards feeding diagonally into the press will be seized and guided substantially as and for the purpose specified."

The patent contains a third claim, but it is not pretended that defendants infringe this last claim as it is for a combination of the tilting feed board, described in the specifications with other parts of the mechanism.

As to the first claim, which is broadly for the method of printing or shading illuminated cards diagonally, by feeding the sheets diagonally into the press and by arranging the form in a corresponding diagonal position, it can only be construed to cover the result described when obtained by the instrumentalities shown; or in other words, in order to infringe this claim the work must be done in substantially the same manner, and by substantially the same mechanism as shown in complainants' patent; if other mechanism is used; or more or less of the mechanism which is shown by the complainants is used to accomplish this result, then there is no infringement of this claim. The only ground upon which this claim can be sustained at all is that it is a claim for diagonal printing to be accomplished by the means shown, and not for diagonal printing as a result, nor can it be held to cover a mere mode of working or manipulating a common

printing press when no material changes are made in its mechanism, and only the working position of one or more of its movable parts is changed, as the proof shows that diagonal printing was not new at the time this device was invented, but had been done before by other instrumentalities.

The second claim is for a combination of old and well known parts of a cylinder chromatic printing press and the nippers "each successively longer than the other with their working ends in a line diagonally across the cylinder," and the vibratory guides, and no one can be charged with infringement of this patent, unless he uses the whole combination or known substitutes therefor.

The defendants do not use the vibratory guides which form a part of complainants' combination, nor any substitute therefor, but adjust their sheets diagonally upon the feeding board and deliver them to the cylinder corner-ways by the aid of pins fixed in the feeding board, by means of which the sheet is delivered upon the cylinder at the proper angle to correspond with the angle at which the form is placed upon the bed of the press. Defendants also use long and short nippers so arranged as to form a V corresponding nearly to the shape of the corner of the sheet to be taken hold of.

The proof also shows that diagonal printing, either in several colors or one color, is not new to the printing art, and also that pins upon the feeding board as a means of obtaining such an adjustment of the sheet on the board as will secure its delivery on the cylinder at the proper angle, or position, to correspond with the form on which it is to be printed, was old and well known long before this patent was obtained.

The proof showing that defendants have only used pins as the means for arranging their sheets upon the feeding board, and that they do not use the guides described by the complainant, I am of opinion they do not infringe either of the

claims of the patent, because their pins are not the equivalent of the complainant's guides, but are such devices for arranging the sheets upon the feeding board, as were well known to printers long before this inventor entered the field. It is true the defendants use nippers which correspond in their function and effect to those described in complainant's patent; but the defendant's nippers are not arranged "each successively longer than the others and with their working ends in a line extending diagonally across the cylinder," but they are arranged so that their working ends form a triangle or V. It is also true that defendants did not remove the guides from their press, but simply turned them back upon the shaft; this, however, is equivalent to a removal of the guides, as they performed no part in the work of holding or adjusting the sheets

I may add, that I see nothing in what the defendants have done more than the mere mechanical adaptation of their machine to a peculiar kind of work, which did not require invention.. Their press, with its working appliances, such as the nippers and feed board, was arranged to do square printing. They could arrange a form in the bed of the press, so that it could be printed lengthways or crossways, and must feed the sheets into the press so as to correspond with the form. If it became desirable or fashionable to print in colors diagonally, it was obvious, it seems to me, to any mechanic, or man of ordinary mechanical skill accustomed to the working of such a printing press, that in order to print diagonally, all he had to do was to place his form at the required angle on the bed of the press, and feed the sheets so that they would be delivered by the cylinder upon the form at the same angle with the form. To do this more surely, defendants changed the nippers so that they would grasp the corner of the sheet and placed the sheet at the proper angle on the feeding board, by the aid of pins. Pencilled or inked lines might probably be

used for the same purpose, although it would require a more expert feeder to do the work. So, too, the ordinary nippers used for square work may be used by the defendant's process, as was demonstrated by some actual work done in the presence of the counsel and myself on a visit to the defendant's press room, although it is probable they would not always secure so perfect a register with the short nippers, as with nippers arranged in V shape.

I cannot, therefore, see in what defendants have done anything more than one of those allowable mechanical changes which any skilled manipulator of a printing press, familiar with its capacities for doing various kinds of work, may make to adapt his machine to his work. The art of printing in blended colors has been greatly cheapened by late inventions pertaining to the chromatic press, with which complainant's invention has nothing to do. The only claim of these inventors is that they have devised a new and useful mode of printing those blended colors diagonally across the card, instead of printing them in bars parallel to the sides or ends of the card, and I only intend to be understood as holding in this case, that defendants do not infringe, because they do not use all complainants' combination, and because they do their work on a chromatic press, without making any substantial changes in its mechanism.

The bill is therefore dismissed for want of equity, on the ground that I find there is no infringement of complainants' patent.

WILLIAM F. HIGGIE *et al.* vs. NATIONAL LLOYDS.

District Court—Northern District of Illinois—November, 1882.

1. Admiralty—Presumption of Unseaworthiness of Vessel.—If a vessel soon after leaving port upon a voyage, without encountering any severe storm or other extraordinary peril of the sea, finds herself unable to proceed on the voyage, and on making a near port of safety in a leaking condition, it is discovered that her timbers are badly rotten, and her condition such that she cannot be made seaworthy by any ordinary repairs, there is a strong presumption that the vessel was unseaworthy when she started on her voyage.

2. Marine Insurance—Implied Warranty of Seaworthiness.—In case of insurance of the freight list of a vessel, there is an implied warranty on the part of the assured that the vessel is seaworthy when she commences her voyage, and if she is not, the risk does not attach.

3. Voidable Insurance—Mis-statement of Rating by American Lloyds.—Where a vessel has once been classed by the American Lloyds for insurance purposes as A 1½, and then is disrated because of her condition, and the owner after making considerable repairs on the vessel, obtains a certificate restoring her to her former rating, from a person represented to be, and whom the owner supposes to be, an accredited agent of the American Lloyds, when in fact he is not; a policy of insurance obtained upon the vessel on the representation that she has been restored to her former rating of A 1½ by the American Lloyds, without intentional misrepresentation, is voidable.

4. Retaining Premiums—Knowledge—Estoppel.—The fact that the insurer retained the premiums, after notice of loss, until the commencement of suit, will not estop him from setting up that the policy is void by reason of the unseaworthiness of the vessel and misrepresentation in obtaining the insurance, if he did not know the facts avoiding the policy, before the loss occurred.

Rae & Smith, for libellants.

David Fales and *C. E. Kremer*, for respondents.

Higgie vs. National Lloyds.

BLODGETT, J.—This is a libel on a contract of insurance made by the respondents with the libellants, as owners of the schooner G. G. Cooper, whereby respondents insured the freight list of the schooner for a voyage from Las Palmas in the Canary Islands to Rio Janeiro, Brazil, in the sum of $1,800, the certificate of insurance bearing date July 8, 1879, and having been issued from the office of the agent of the respondents in the city of Chicago on the application of the owners of the schooner.

Two defenses are urged by the respondents to the claims of the libellants: First, that the vessel whose freight list was so insured was not seaworthy at the time of the commencement of the risk; second, that the policy of insurance was obtained upon false representation as to the rating and classification of the schooner for insurance purposes by the American Lloyds.

It appears, from the proof in the case, that the schooner in question was built upon the waters of Lake Erie in the year 1863; that she was about 310 tons burden, and what was known as a "canal vessel," that is, a vessel narrow enough to pass through the Welland Canal; that in the season 1878 she was taken through the canals to Montreal and there inspected by the agents of the American Lloyds and classed for insurance purposes A 1½. During the latter part of the year 1878, she made a voyage from the St. Lawrence river to Falmouth, England, with a cargo of deals, encountered much rough weather and arrived at Falmouth considerably out of repair. From her arrival at Falmouth the American Lloyds reported the certificate of classification given by that society as suspended. At Falmouth she took on a cargo of coal for Gibraltar, and on her voyage through the Bay of Biscay met with such disaster from rough weather that she was obliged to put into the port of Cadiz, Spain, in a dismantled and wrecked condition, where she was surveyed and examined

under direction of the American consul at that port and condemned to be sold as unseaworthy. At the offer of sale made in pursuance of this condemnation, no bidders appeared and no sale was effected. One of her owners shortly after arrived at Cadiz, and, under the instructions or advice of the American consul at that port, proceeded to repair the vessel, and during the winter placed such repairs upon her as he was assured entitled her to be restored to her former rating, and a certificate to the effect that she had been so restored was endorsed upon the original certificate of classification given by the American Lloyds in July, 1878, by a Mr. Benjamin G. Haynes, who was represented as the agent of the American Lloyds at Cadiz. Some time during the month of March following, the schooner took on board a cargo of about 445 tons of salt to be transported from Cadiz to the port of Rio Janeiro, Brazil. She also had on board, besides her crew, about twenty passengers for Rio Janeiro. She sailed from Cadiz upon her voyage to Rio Janeiro about April 17, 1879, made the port of Tangiers, Morocco, where she remained a few days and proceeding on her voyage, arrived at Las Palmas in the Canary Islands about the 10th of May. From this point her master addressed a letter to W. F. Higgie, one of her owners in this city, which was received here in due course of mail, stating that he would sail from Las Palmas in continuation of his voyage on the 21st of May, and on that day he did set sail in prosecution of his voyage from Las Palmas, and shortly after leaving that port encountered a heavy sea causing the vessel to roll badly, and during the night of the 21st and the morning of the 22d, the vessel was found to be leaking to such an extent that the master, at the instance of his crew and passengers, deemed it best to make a port of safety, and accordingly put in at the port of Santa Cruz in the Island of Teneriffe, distant from Las Palmas only about fifty-four miles, where she arrived on the af-

ternoon of the 22d. Soon after the arrival at the latter port, the second mate and some of the seamen made complaint to the American consul resident there, that the schooner was unseaworthy and unfit to continue her voyage and a survey was ordered by the consul which resulted in a report from the surveyors to the effect that the vessel was wholly unseaworthy and unfit to pursue and complete her voyage, and such proceedings were taken by the consul that the vessel was condemned and ordered to be sold, and she subsequently was sold in the port of Santa Cruz, Teneriffe, under the order of condemnation and her voyage to Rio Janeiro was thereby broken up. The captain not being able to obtain another vessel in which to transport her cargo to the port of destination, the salt was stored, under the direction of the consul at Santa Cruz and no freight was earned thereon.

On or before July 8, and after the receipt of the letter from the master, dated at Las Palmas, W. F. Higgie, one of the libellants residing here, applied to the agents of the respondents in this city for insurance of $1,800 upon the freight list of the schooner. The agent had in some way become advised of the fact that the schooner had been condemned the winter before at Cadiz, and disrated by the American Lloyds, but he was informed by Mr. Higgie that he had, under the instruction of the American consul at Cadiz, put such repairs on the vessel that she had been fully restored to her rating, and was then rated A 1½ by the "American Lloyds."

Considerable testimony has been put into the record bearing upon the question of the condition of the vessel at the time she left the harbor of Cadiz, the testimony on the part of the libellants tending to show that she received repairs to the extent of over $6,000, and that after she had been so repaired the endorsement was made upon her certificate of classification, which had been given her in Montreal, stating that she had been restored to her former rating.

This being a voyage policy whereby the underwriters assumed to insure the freight list of this vessel, "lost or not lost," for the voyage from Las Palmas to Rio Janeiro, the condition of the vessel in respect to seaworthiness, at the time she left Las Palmas, which was the time the risk commenced, becomes a material matter of inquiry.

The defense insists that she was unseaworthy at the time she left the port of Las Palmas, and in support of this assumption, have produced the testimony of the surveyors by whom she was examined and condemned at Santa Cruz, from whose testimony it appears, that her timbers were found to be badly rotted, her butts sprung, and her condition such that she would not hold her caulking, and could not be made seaworthy by ordinary repairs. It is, therefore, contended by respondents that the condition in which the vessel was found when examined at Santa Cruz, is substantially the condition in which she left Las Palmas, she having been out only one day between Las Palmas and Santa Cruz, and not having encountered any very severe storm. The testimony of the master of the vessel does not, I think, justify the conclusion that the storm was of a very severe character. He says in answer to the 49th question, on his direct examination: "After we left Las Palmas, she encountered heavy weather. There is a trade-wind down there which makes a very heavy sea; they shook her up pretty lively; she rolled very heavy, first one way under, and then the other way under." In answer to the 51st interrogatory he says: "We had to reef sails, and shorten things down. Between midnight and morning, found she was making more water than usual; at daylight was making water very badly, so much so, it was thought best to make a port of safety, and find out whether they could do anything to stop the leaks." He also says: "While in the roads at Santa Cruz, she did not seem to make so much water as while at sea; found some leaks above the

water which we stopped by caulking. After the re-caulking everything was all right, and I was willing to proceed on my voyage."

It clearly appears from the testimony of the master that he did not think the vessel unseaworthy when she arrived at Santa Cruz and that he did not think her condition very much changed after she arrived there from what it was when she left Las Palmas, nor did he think she had encountered such a peril of the sea as to disable her and make her unfit to perform the voyage; while it most manifestly appears from the testimony of the surveyors, who seem to have been candid and impartial men, one being the master of an English bark, another the master of a Norwegian bark, which happened to be in the port of Santa Cruz at the time, and the other a ship carpenter residing at Santa Cruz, that the condition of the vessel's timbers was such from rotteness, that she was not fit to complete the contemplated voyage; and I cannot, in the light of the testimony in the case, considering the history, age and build of the vessel, believe that she was in a sound and seaworthy condition at the time she commenced this voyage, that is at the time she left Las Palmas for Rio Janeiro. It seems very clear to me that, if her timbers had been sound she could have been readily repaired from any damage she sustained on the night of the 21st, between Las Palmas and Santa Cruz, so as to have proceeded without danger upon her voyage; but it is probable that the rolling which she encountered, did develop the inherent rottenness to such an extent as to cause her to leak and cause alarm among her seamen and passengers, who demanded the survey which resulted in her condemnation. In *Cort vs. Delaware Ins. Co.*, 2 Wash. C. C. 375, it is said: "If a vessel, after she commences her voyage, becomes unfit to prosecute it, and has been exposed to no extraordinary perils of the sea, this circumstance may raise so strong a presumption of her having been unseawor-

thy at the time of her departure as to call upon the insured to give strong evidence to repel the presumption." And I must say that I do not think the libellants' testimony overcomes this presumption. There was no extraordinary peril encountered; the vessel rolled heavily upon the waves produced by the trade-winds. There was no gale, no storm such as would have imperiled a staunch, strong vessel. Assuming it to be a well settled rule of insurance law, that there is an implied warranty of seaworthiness at the time of the inception of the risk,—which position is fully sustained by the following authorities and many others which might be cited: 1st Parsons on Marine Ins. 367; Phillips on Marine Ins. 378; *Hazard vs. Insurance Co.*, 8 Peters. 578; *M'Lanahan vs. Insurance Co.*, 1 Peters, 170,—I must hold that this warranty was broken by reason of the unseaworthiness of the vessel at the time the voyage commenced, and the risk never attached and the policy is therefore void. If the vessel was not seaworthy at the commencement of the voyage then this contract of insurance never became binding upon the underwriters because the contract was made upon the implied warranty of seaworthiness.

The proof also shows, quite satisfactorily, that this policy was issued upon representations made to the agent of the underwriters that the schooner was, at that time, classed A 1½ in the "American Lloyds," and that this policy would not have been issued but for this representation; the "American Lloyds" being an association whose business is to inspect and classify vessels for insurance purposes, and this respondent as well as most underwriters of ocean risks adopting the rating or classification of the "American Lloyds" for the purposes of their business.

It appears from the proof that, after this vessel met with her disasters in her voyages between Montreal and Falmouth, she was disrated and reported as such in the books of the

"American Lloyds," I have no doubt, however, from the proof that Mr. Higgie, the owner, was informed by the American consul at Cadiz that Benjamin G. Haines was the agent of the "American Lloyds," and that Higgie, in good faith, supposed from the indorsement made upon her certificate of classification by him, that she had been fully restored to her rating in the "American Lloyds." The proof, however, is conclusive to my mind that Mr. Haines was not the agent of the "American Lloyds" at Cadiz, and had no authority for or on behalf of that association to give this vessel a rating or classification, or to restore her to the classification from which she had been suspended; and while there is no proof going to show there was any intentional fraud on the part of the owner of this vessel in making the representation to the insurance company that she had been restored to her rate, yet there is no doubt in my mind that he would not have obtained this policy but for the representations that this restoration had been made by an agent of the "American Lloyds" and that the agents of the respondents acted upon the belief that she had been so restored, while the contrary was true. This undoubtedly is such a mis-statement in regard to a material fact touching this risk as makes this contract void between the parties. A positive representation as to a material fact is as essentially a part of the contract as a warranty and must be substantially true and if untrue releases the insurer.[1]

It is a noticeable and somewhat suggestive fact in connection with this branch of the case that the testimony of neither the consul at Cadiz nor Haines has been taken by

[1] *Hazard vs. Insurance Co.*, 8 Peters, 578; *Sawyer vs. Insurance Co.*, 6 Gray, 221; *Curry vs. Insurance Co.*, 10 Pick. 535; *Wilbur vs. Insurance Co.*, 10 Cush. 446; *Kimball vs. Insurance Co.*, 9 Allen, 540; *Campbell vs. Insurance Co.*, 98 Mass. 381.

the libellants for the purpose of showing upon what authority they made this statement to Captain Higgie to which he has testified. I think the fair presumption from the absence of the testimony is that their testimony would not have benefited the libellants' case. I must, therefore, conclude, *first*, that the policy never attached to this freight list, by reason of the breach of the warranty of seaworthiness of the vessel; and *second*, that the policy was issued by reason of such a mis-statement as to the facts in regard to the classification and rating of the vessel as to make it void against the respondents.

There was, however, no offer to return the premiums received for this policy by respondents, until the hearing of the case, when the premium was paid into court for the benefit of libellants; and it is insisted upon the part of libellants that by retaining the premium after notice of the loss, respondents have estopped themselves from claiming that the policy was void by reason of the breach of the implied warranty of seaworthiness, or by reason of having obtained the insurance upon a mis-statement of facts. But the loss had occurred before respondents became aware of the fact of unseaworthiness at the time of the inception of the risk, or of the misrepresentation as to the facts of rating; if before the loss occurred, respondents had become aware of the fact of breach of warranty or that the policy was obtained by misrepresentation, and still retained the premium, the doctrine of estoppel *in pais*, might have been perhaps properly invoked, but no injury has come to libellants by the failure to return this premium since the loss accrued, nor have they been induced to do any act which they would not have done if the premium had been returned or offered to them; and I have no doubt that it having now been paid into court for the libellant, this objection will not avail them.

The order will be that the money paid into court be paid to libellants, and the libel dismissed with costs against libellants.

The failure of the steering apparatus by the splitting of the rudder post, in a gale of no extraordinary violence, is evidence of unseaworthiness: *Lyon vs. Barrels of Salt*, 2 Chicago Legal News, 317.

It is a breach of the warranty of seaworthiness, for a vessel to leave her port of lading abroad, or any intermediate return port, with a crew inadequate to man or sail her; and the difficulty, or even impossibility of procuring competent hands, is no justification: *The Gentleman*, 1 Blatch. 196.

To be seaworthy as respects cargo, the hull of the vessel must be tight, staunch, and strong enough, to resist the ordinary action of the sea during the voyage, without damage: *Dupont vs. Vance*, 19 How. 162.

For other cases in this connection, besides those cited in the opinion, see also *The Vincennes*, 21 Law Reporter, 616; *Bullard vs. Insurance Co.*, 1 Curtis, 148; *Watson vs. Insurance Co.*, 2 Wash. C. C. 480; *Tidmarsh vs. Washington F. & M. Ins. Co.*, 4 Mason, 439; *Jones vs. Insurance Co.*, 2 Wall. Jr. C. C. 278, *Rouse vs. Insurance Co.*, 3 Wall. Jr. C. C. 367; *United States vs. Hunt*, 2 Story, 120; *Bazin vs. Steamship Co.*, 3 Wall. Jr. C. C. 229; *Dorr vs. Pacific Insurance Co.*, 7 Wheaton, 581; *The Keokuck vs. Home Insurance Co.*, 2 Chicago Legal News, 249. [*Reporter.*

ROBERT NEWTON vs. THE FURST AND BRADLEY MANUFACTURING COMPANY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—NOVEMBER, 1882.

IN EQUITY.

1. PATENTS—GANG PLOW BRAKES—NOVELTY—ORIGINAL DAVENPORT PATENT LIMITED—The first claim of the original patent issued to F. S. Davenport, October 9, 1866, for an improvement in gang plows examined, and, *held*, that in view of the state of the art at that time, the patentee was not entitled to a broad claim for every device by which the plow is lifted from the ground by the power of the team through a brake or friction clutch, but must be limited to his specific device shown and described.

2. SAME—INFRINGEMENT.—The brake of the Davenport patent which was arranged to engage with the rim or periphery of one of the ground or carrying wheels, for the purpose of raising the plows out of the ground, is not infringed by the use of a friction band, arranged to engage with the extended hub of one of the carrying wheels, and accomplishing the same result.

3. CONSTRUCTION AND LIMITATION OF RE-ISSUE.—The re-issue of the Davenport patent, of date December 2, 1879, claiming broadly the combination of a swing-axle, plow beam, carrying wheel, and friction clutch mechanism adapted to raise the plows by locking the axle to the carrying wheel, cannot be construed to include all kinds of swing-axles, friction clutches, plow beams and carrying wheels, but must be limited to the particular kind shown.

4. RE-ISSUE—LACHES—BURDEN OF PROOF.—Where a re-issue is obtained thirteen years after the date of the original, in order to sustain the re-issue, it must be shown that there was some mistake or inadvertence in the original which made a re-issue necessary.

5. The fact that a claim which is broader in the re-issue than in the original, might have been allowed in the original, does not show that it is valid in the re-issue.

Coburn & Thacher, for complainant.

West & Bond, for defendants.

Newton vs. Furst & Bradley Manfg. Co.

BLODGETT, J.—This is a bill to enjoin an alleged infringement of a patent originally issued on the 9th of October, 1866, to F. S. Davenport, for an improvement in "gang plows," and re-issued December 2, 1879, to the complainant as assignee of Davenport.

The original patent as shown, covered nearly all the elements which enter into the organization of a "gang plow," and contained eight claims covering the several specific devices which were combined to form the complete mechanism.

One of the features of the original patent was a brake, arranged to act upon one of the ground or carrying wheels, by means of which the forward ends of the plow beams were raised, so that the plows, when in motion, would be lifted or thrown out of the ground by the power of the team; and this feature was specifically covered by the first claim.

The re-issue contained only three claims, all intended to cover the brake, or as it is called in the re-issue, "the clutch mechanism" by which the plows are lifted from the ground.

The defenses set up by the defendants are, first, that they do not infringe the complainant's patent; second, that the re-issued patent is void, for the reason that it is for a different invention than that described in the original, and has been unwarrantably expanded from the original.

It appears from the proof, that after the issue of the original patent, a few plows were made embodying the general features of the patent as a whole, but after a short experiment in offering this plow to the public, the owner of the patent and those operating under it introduced material changes in the general structure of the machine, and only retained so much of the original device as embraced the mode of lifting the forward ends of the plow beams from the ground by means of the brake applied to the periphery of the wheel. In 1874, the defendant company took a license

from Mr. Newton, who was then the owner of the Davenport patent, and up to 1879 continued to make and sell "wheel plows" containing the Davenport brake attachment for lifting them out of the ground. As early as 1876, the defendant, in order to meet competition from other manufacturers, began the manufacture of the "wheeled iron" or "sulky plow," which is now charged to be an infringement of complainant's patent, but continued to make plows with the Davenport brake attachment until the fall of 1870, and to pay royalties to complainant therefor, under the terms of its license. In the fall of 1879, the complainant insisted that the defendant's new iron plow infringed the Davenport patent, and demanded royalties thereon under the license, which the defendant refused to pay. The complainant then obtained this re-issue of the Davenport patent, and this suit is brought to determine whether the new iron plow of the defendant infringes the Davenport patent as it now stands re-issued.

The complainant's patent shows a plank or board, ten or twelve inches wide, to each end of which spindles are attached for the ground or carrying wheels to run on; this is called in the specifications, "the hinged board G," and to it the forward ends of the plow beams are attached by joints, so that when this board axle or hinged board lies flat or horizontal, the plows are fastened to the rear or back edge of this board or broad axle; and when the axle is turned up on edge, or vertically, the ends of the plow beams are lifted to a height equal to the width of the board or axle, from its center. The brake mechanism is so arranged that when the brake is made to engage with one of the carrying wheels in motion, this axle is turned up edgewise, and the plows thereby lifted out of the ground.

The first claim of the original patent was in these words:

"I claim as new, and desire to secure by letters patent,

First—The lever P, rod Q and brake R, arranged and operating as and for the purposes described."

The claims in the re-issue are as follows:

First—In a wheel plow, the combination with a swinging axle and ground or carrying wheel, of a friction clutch mechanism, and means to engage and disengage the latter with the ground or carrying wheel, said parts being constructed and adapted to raise the plow by locking the swing axle to the carrying wheel by friction clutch engagement, and raise the plow beam by the draft or power of the team, substantially as set forth.

Second—In a wheel plow, the combination with the ground wheel, and swing axle and a plow beam connected to the latter, of clutch mechanism connected to the axle, and adapted by engagement with the wheel to utilize the draft of the team in turning the swing axle in an upright position, and thereby raise the plow beams, substantially as set forth.

Third—In a wheel plow, the combination with a ground wheel, and swing axle and a plow beam connected to the latter, of a friction clutch, connected to the axle, and adapted by contact with the wheel to turn the axle into an upright position, and thereby raise the plow beam by aid of the draft of the team, substantially as set forth.

The defendant's machine is a wheel or sulky plow with a bent or cranked iron axle upon which the plow beams are pivoted at about two-thirds of the distance from the forward end to the coulter; so that the plow is nearly balanced upon the axle or crank, and the arrangement of the mechanism is such, that when the plow is running or operating in the ground, the crank part is in a horizontal position, and when it is desired to raise the plows out of the ground, the crank is turned upward towards a vertical position, whereby the forward ends of the beam are raised until the point of the plow runs out of the ground. After the forward end of the beam

has risen to a certain point, it strikes a stop, so that when the crank has assumed a vertical position, the plow is balanced across the crank part of the axle, thus sustaining the plow at the height above the ground, of the crank when in a vertical position. This turning of the crank axle, so as to lift the plow, is accomplished by a friction band or brake, which is made to engage with an inner extension of the hub of one of the carrying wheels, so that as the wheel moves forward, it causes the crank axle to turn upwards from a horizontal to a vertical position.

Is this friction band, encircling the extension of the hub of the carrying wheel in the defendant's plow, an infringement of the Davenport patent?

Both these devices utilize the power of the team which draws the plow, to raise the plow out of the ground. The purpose of each is substantially the same. The Davenport device applies the brake to the periphery of the carrying wheel. The defendant applies a friction band to the hub of the wheel. It must be conceded that these devices, in their mode of operation and effect, are very much alike; and if the state of the art was such, when Davenport entered the field, as to entitle him to a broad claim for any device by which the plow is lifted from the ground by the power of the team through a brake or friction clutch, I should have little hesitation in holding that the defendant's machine infringes that of the complainant.

It therefore becomes necessary to examine, in the light of the evidence in this case, the state of the art at the time Davenport made his invention.

The proof shows that in April, 1858, G. F. Anderson, of New Hampshire, obtained a United States patent for a seed drill or corn-planter, which, in addition to the apparatus for dropping, carried plowshares for the purpose of covering the seed. This is a wheel machine and shows an axle with cams

or eccentrics and a clutch mechanism whereby the axle is to be connected with one of the carrying wheels, so that the axle will rotate with the wheel, and the eccentric thereby raise the plow and seed tubes off the ground to the extent of one-half a revolution of the cams. This cammed axle, or axle with eccentrics affixed to it, operates for the purpose of raising the plows out of the ground precisely like a crank axle, and the plows are raised by the draft or power of the team. It is also noticeable that this Anderson clutch mechanism is arranged to engage with the end of the hub of one of the wheels, therein closely resembling the device of the defendant in most respects except that it is not a "friction clutch."

The United States patent of H. H. Baker issued in December, 1860, for a "wheel plow" shows a clutch mechanism made to engage with a pin in the rim of one of the carrying wheels, whereby the plows were raised and caused to run out of the ground. This machine shows no crank axle, but it shows a rock shaft extending transversely across the frame which for the purposes of the function of raising the plows from the ground, takes the place of the cammed axle of Anderson, or the hinged board G, of Davenport.

After describing his device in his specifications, Baker makes a specific claim for "raising the plows 1 and 2 vertically, at will, by the motion of the bearing wheel through the aid of mechanism, substantially as set forth."

Here we have an inventor who not only shows a clutch mechanism arranged to engage with the bearing wheel and thereby raise the plows from the ground by the motion of the wheel, but he claims that as his particular invention.

The United States patent of H. R. Huie issued in August, 1868, for a "wheel plow," shows a crank axle in combination with a plow beam for the purpose of raising the plow from

the ground, but he uses no brake and does not utilize the power of the team to lift the plows.

I also find that a clutch mechanism arranged to engage with one or both of the carrying wheels was a common device for raising the teeth of a horse hay rake from the ground, long before the Davenport invention. And in the United States patent to G. H. Daily and Robert M. Treat, issued in November, 1862, a crank axle is shown with brakes arranged to engage with the periphery of the wheel for the purpose of raising the rake teeth. This friction clutch or brake, operated directly in combination with a crank or swing axle, and is so similar to the Davenport device for raising his plows that you have only to substitute a plow in place of a rake tooth, and you have almost an exact reproduction of Davenport's mechanism for raising the forward end of his plow beams.

I might, if I deemed it necessary to do so, refer to other proof in the case, but think it is already apparent that, at the date of Mr. Davenport's patent, older inventors had shown devices in wheel plows for utilizing the motion of the carrying wheel to raise the plow from the ground to such an extent, and so nearly embodying the same instrumentalities adopted by Davenport, as to limit his claims as an inventor to his specific devices. It is true that some of the machines to which I have referred were not organized as plows, but their uses are so analogous to that of plows, and with a knowledge of these machines which Davenport must be supposed to have had, it was so easy to adapt these old corn-planter and horse rake devices to a plow mechanism, that I deem them pertinent upon the question of the state of the art.

After a careful study of the mechanisms of the complainant and defendant, I find that the brake R, of the Davenport patent, which was arranged to engage with the rim or

periphery of the bearing wheel for the purpose of raising the plows, is not identical with the friction band of the defendant's plow, which is arranged to engage with the extended hub of one of the carrying wheels; for although the result of the operation of each is the same, I do not think defendant's friction band can be said to be the same means for engaging or disengaging the axle and carrying wheel so as to raise the plow or plows, as Davenport's brake R.

It will be borne in mind that, in the original patent, this device for raising the plows is claimed simply as "lever P, rod Q and brake R, arranged and operating," etc., while in the re-issue the claims are broadly for combinations of a swing axle, plow beam, carrying wheel, and friction clutch mechanism adapted to raise the plow by locking the axle to the carrying wheel. This cannot be construed to include any and all swing axles, and any and all friction clutches, and any and all plow beams and carrying wheels; but it must be such a swing axle, friction clutch, carrying wheel and plow beam as are shown in the complainant's device. Referring then to the complainant's patent, we see that he does not describe a swing axle at all, but describes a hinged board G; and although this may have many of the characteristics of a swing or crank axle, it was something more than that in the complainant's organization.

So the complainant's friction clutch can only operate to raise the plows when the team is moving forward, while the defendant's friction band is so arranged, in connection with the hub extension, that defendant's plow can be lifted from the ground when at rest. I am therefore of the opinion that the defendant's friction band does not infringe the friction clutch shown in the complainant's mechanism, and that the complainant, upon the state of the art, had no right to claim broadly any friction clutch whereby the crank axle should

be locked to the wheel, but is confined to the friction clutch shown in his specifications and drawings.

As to the question raised in regard to the validity of the re-issue, I do not deem it necessary to say more than that under the recent decisions of the Supreme Court with regard to re-issued patents, the owner of this patent had no right thirteen years after the issue of the original to expand the claims of the original patent so as to make it cover the combination of the friction brake with the other parts of the machine which were, perhaps, needed to make it operative, but which Davenport, at the time he took his patent, did not deem were any part of his invention. Both the evidence of the state of the art at the time Davenport took his patent, and the history of the uses to which this patent has been applied, all show that Davenport had no right to claim the combination of clutch mechanism, and cranked or cammed axles, which are the same, for the purpose of raising the plow out of the ground by the power of the team, for Anderson had done this in his combination seeder and plow, and the analogous device of the horse rake would certainly suggest how this might be done, if not instruct as to the mode of doing it, and this expansion of the complainant's patent was evidently made after the defendant's iron plow had been brought out, and for the purpose of covering the device of raising the plow which is there shown. Clearly, if the claim of the original patent did not cover the device used by the defendant, and if a re-issue was necessary to expand or explain the patent in order to cover the defendant's plow, then such re-issue is void in the light of the case of *Miller vs. The Bridgeport Brass Company*, 104 United States, 350; and *Campbell vs. James*, 104 United States, 356. It certainly seems to me incumbent on the owner of a patent, when a re-issue is taken so long after the date of the original, to show that there was some mistake or inad-

vertence in the original issue which made a re-issue necessary to cover all the patentee had invented; but the most that can be said in support of this re-issue is, that perhaps, if Davenport had asked for these combination claims when he took his original patent, they might have been allowed at that time, but this does not show that, after waiting thirteen years and till others had used the combination, he can now be allowed by a re-issue to take all the combination claims which might have been conceded to him at the issue of his original, and thereby prevent others from reaping the benefit of improvements they have made in his mechanism and which he neglected to claim in apt time to prevent others from using what he had abandoned.

I, therefore, find, First—That defendants do not infringe the complainant's patent as charged. Second—That the re-issue is void by reason of the expansion of the claims beyond those of the original patent.

The bill is therefore dismissed for want of equity.

UNITED STATES vs. JOHN W. MURPHY, ASSIGNEE, ETC.

CIRCUIT COURT—DISTRICT OF INDIANA—DECEMBER, 1882.

1. PRIORITY OF CLAIMS DUE GOVERNMENT MUST BE ASSERTED IN BANKRUPTCY BEFORE FINAL ADMINISTRATION.—If the United States Government hold a claim against a debtor in bankruptcy, and with knowledge of the proceedings in bankruptcy fails to prove its claim, or have it allowed in some form, it cannot assert any rights against the assignee or trustee, after the estate is fully administered and the fund distributed under orders of the court.

2. WAIVER OF PRIORITY BY GOVERNMENT.—The failure of the Government to assert its right of priority to the funds in the Bankruptcy Court, is to be deemed a waiver of such right, for it can assert such right only in the manner allowed by the Bankruptcy Act.

3. KNOWLEDGE OF CLAIM DOES NOT RENDER ASSIGNEE PERSONALLY LIABLE.—The fact that the assignee knew of the claim of the Government against his bankrupt and failed to retain funds enough to pay it, did not render him personally liable after final distribution of the assets, if the Government did not present such claim before.

4. JOINT JUDGMENT—SATISFACTION AS TO ONE DISCHARGES ALL.—If the Government, having a joint judgment against several defendants, enters upon the margin of the record of the judgment a satisfaction of the judgment as to one of the judgment debtors only, this will operate as a satisfaction and discharge as to all.

The United States recovered judgment in this court, in 1871, against James Burgess, Stephen Major, Greenville Wilson and William C. Tarkington, as sureties upon the bond of Garland D. Rose, post-master at Indianapolis. In the year following Tarkington was adjudicated a bankrupt, and the defendant was appointed and confirmed trustee to receive and administer upon the estate, under the directions of a committee of creditors and the orders of the court. The trustee converted the assets into money, which he dis-

tributed among the general creditors, who had proved their claims, including himself. The money thus distributed was more than enough, after paying expenses of administration, to have satisfied the above judgment, which the defendant knew was unpaid.

To the complaint alleging these facts, the defendant in his special answer averred, that before Tarkington was adjudicated a bankrupt, the marshal had levied an execution, which the plaintiff had caused to be issued on the judgment against Burgess and others, upon real estate belonging to Greenville Wilson, which was, and yet is, worth more than enough to satisfy such judgment; that the attorney of the United States, who was charged with the duty of collecting such judgment, and the proper officers of the United States, who were authorized to instruct such attorney in the premises, and who also knew of the adjudication of bankruptcy against Tarkington, and all of the subsequent proceedings thereunder, neither proved the claim of the United States, as a creditor, nor obtained an order recognizing their supposed priority, or directing its payment, nor objected to any of such proceedings, including the final distribution of the fund; that before any of the fund had been distributed amongst the creditors, and while the estate was yet in process of settlement, the marshal, who had levied on the lands of Wilson, and was maintaining such levy in force, under the direction of the plaintiff, informed the defendant that such levy was sufficient to satisfy the judgment, interest and costs; that although Wilson had filed no contingent claim for contribution, against the bankrupt's estate, yet, inasmuch as it was believed the lands so levied on would sell for enough to pay the entire judgment, the defendant withheld from distribution, for Wilson, $2,419.20, the full contribution portion of the judgment due from the bankrupt, and distributed the balance of the fund under the orders of the court

amongst the creditors who had proved their claims; that since the commencement of this suit, the sum so reserved for Wilson, was paid to the United States, on the demand of the proper officers, and thereafter, viz: on the 21st day of July, 1881, the attorney of the United States, by the authority of its proper officers, made a compromise with Greenville Wilson, with respect to his liability on such judgment, whereby he paid to the United States $1,000, in full satisfaction and discharge of such judgment as against him, and at the same time, the attorney of the United States wrote upon the margin of the record of such judgment, the following stipulation and release: "I hereby enter, by direction of the solicitor of the treasury, satisfaction of this judgment as to Greenville Wilson (see letter of July 17, 1881, accepting $1,000 in compromise of Wilson's liability,) without prejudice to the rights of the United States against his co-defendants herein, and provided always, that all rights of the United States, as to them, and each of them, are hereby expressly saved and reserved"—signed, "CHARLES L. HOLSTEIN, United States Attorney."

Charles L. Holstein, United States District Attorney, for plaintiff.

Baker, Hord & Hendricks and *Claypool & Ketcham*, for defendant.

GRESHAM, J.—Section 3466 Revised Statutes, provides "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied, and the priority hereby established, shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a

voluntary assignment thereof or in which the estate and effects of an absconding, concealed, or absent debtor, are attached by process of law, as to cases in which an act of bankruptcy is committed."

Section 3467 provides that "every executor, administrator or assignee, or other person who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate, for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

It has been held that a discharge in bankruptcy does not bar a debt due the Government,[1] also that the Government is not bound to prove a claim in the bankruptcy court.[2]

But it does not follow that the Government, knowing that the estate of its debtor is being administered upon in the bankruptcy court, may stand by, assert no claim to the fund, suffer the settlement to proceed and final distribution to be made under the terms of the act, without waiving its right of priority of payment out of that fund. The assignee and the trustee are the mere instruments of the court in administering upon the estate; they execute the trust committed to them in obedience to the terms of the act, and under the orders of the court,—in the case of a trustee, also under the direction of a committee of creditors.

Only those creditors who prove their claims, or in some proper form present them and have them allowed, are entitled to share in a distribution of the fund. After an estate has been fully administered in bankruptcy, and the fund distributed under the terms of the act, creditors, including the Government, who with knowledge of the adjudication of

[1] *United States vs. Herron*, 20 Wallace, 251.
[2] *Lewis vs. United States*, 2 Otto, 619.

bankruptcy neglected to prove their claims, or in some form to have them allowed, can assert no rights against the assignee or trustee.

If the Government claims a right of priority out of a particular fund in the hands of the bankruptcy court, it is reasonable and just to treat an omission to assert that right as a waiver of it.

Section 5101 Revised Statutes provides, that in the order of distribution, the following claims shall be entitled to priority: first, costs; second, debts and taxes due the United States; third, debts and taxes due the state; fourth, wages due to operatives, etc.; and fifth, debts due to persons subrogated to the Government's right of priority.

The Government is not bound to go into a bankruptcy court, nor is it bound by a certificate of discharge, but if it claims priority out of a fund upon which the court is administering under the act, it must assert that right, just as the state and operatives and persons subrogated to the rights of the Government are required to do to be entitled to a share in the distribution of that fund.

The Government's right of priority of payment out of a fund in the hands of the bankrupt court, must be worked out through the act.

It is true that the defendant settled the trust and distributed the fund with knowledge of the judgment against the bankrupt and others, but it is also true that the Government knew Tarkington's estate was in bankruptcy, and wholly omitted to assert any right of priority until after the fund had been distributed and the trust had been fully executed under the direction of the committee of creditors and the orders of the court. The Government thus waived its right of priority and assented to the distribution of the fund amongst the creditors who had established their right to it under the terms of its own law—and it would be unjust, if

not oppressive, to now compel the trustee to pay the balance of the judgment out of his own means.

The Government had levied upon real estate of Greenville Wilson, sufficient to pay the judgment, before Tarkington went into bankruptcy. This levy was kept alive during the entire time that the defendant as trustee was settling the estate. There can be no doubt that he executed the trust in good faith and distributed the fund amongst the creditors who had proved their claims, believing that the Government was relying on the specific lien which it had acquired on the real estate of Wilson. Whether this was the purpose of the attorney of the Government and the proper officers of the Treasury department, who had control of the judgment, or not, they, by their conduct, induced him to think it was. With full notice of everything that was done in the settlement of the estate, and without intimation of any kind, before distribution, that it claimed a right of priority in the fund, the Government now sues the trustee personally, as upon an implied assumpsit.

The defendant's undertaking, when he accepted the trust, was, that he would administer the estate according to the act and the orders of the court. This he did. There was no assumpsit, express or implied, to do anything else. It would be clearly inequitable and unjust, on the facts already stated, to charge a liability on the defendant, and the law implies no assumpsit under such circumstances.

Thus far I have considered the demurrer to the special answer without reference to the compromise between the Government and Wilson. This occurred long after the defendant had distributed the fund and had been discharged from his trust, and after the bringing of this suit.

An actual release of one joint obligor discharges all, though it is otherwise in a covenant not to sue.

It has been decided in numerous cases, that a release

reserving the right to sue others is not a technical release, but only a covenant not to sue.

It seems clear, that both the Government and Wilson understood that the latter was to be absolutely discharged from all liability on the judgment. The entry was not a covenant to release the levy or to suspend further proceedings on the judgment, but a perpetual "satisfaction" of it as to Wilson. No execution can issue on the judgment against him and no action can be maintained on it against him. It would be a strained construction of the entry of satisfaction to hold that the Government meant no more than a contract not to sue on an existing judgment. If the entry was only intended to have the effect of a covenant not to sue, then the Government might maintain an action against Wilson on the judgment, and his only redress for the breach would be an appeal to Congress for relief. The duty of paying the judgment rested alike upon all of the defendants, and the absolute satisfaction of it as to one, discharged all.[1]

Demurrer overruled.

[1] *Cheatham vs. Ward*, 1 Bosanquet & Puller, 630; *Ballam vs. Price*, 4 English Common Law, 535; *Nicholson vs. Revill*, 31 do. 300; *Kearsley vs. Cole*, 16 Meeson & Welsby, 127; *Joy vs. Wurtz*, 2 Wash. C. C. 266; *Wiggin vs. Tudor*, 23 Pick. 444–5; 1 Lindley on Partnership, 488.

J. A. FAY & CO. vs. NORMAN D. FRASER, Administrator de bonis non, etc.

Circuit Court—Northern District of Illinois—December, 1882.

In Equity.

1. Enlargement of Claim in Re-issued Patent—When Void.—If a claim in a re-issued patent is intended to be and is an expansion of the claim of the original patent, in order to claim elements which were not claimed originally, it is void.

2. New Claims in Re-issued Patent—When Valid.—But if new claims in the re-issue are only re-statements of the functions and mode of operation of the elements of one of the claims of the original, in combination with the other parts of the machine, then they are valid.

3. Patent for Planing Machine Construed—Divided Pressure Rollers.—The fourth claim in the original and the new claims in the re-issue of Goodrich and Colburn's patent, No. 111,632, re-issue No. 8,438, for "an improvement in planing machines," construed, and *held*, to require that the pressure rollers should be used in combination with the independent swinging arms which are described in the specifications; and that, in view of the state of the art, they cannot be expanded so as to cover all divided or broken pressure rollers.

4. Infringement.—Inasmuch as the defendant does not use the swinging arms, *held* that he does not infringe.

This was a bill brought by the complainant, a corporation of Ohio, against Norman D. Fraser, administrator *de bonis non*, of the estate of Eber C. Preble, deceased, for an injunction and account by reason of the alleged infringement of a patent issued by the United States to James Goodrich and Henry J. Colburn, bearing date February 7, 1871, and numbered 111,632, and re-issued on the 1st of October, 1878, to the said Goodrich and Colburn, assignors of W. H. Doane,

the re-issue being No. 8,438 for "an improvement in planing machines."

Parkinson & Parkinson, for complainant.

Geo. P. Barton, for defendant.

BLODGETT, J.—The defense relied on is:

First—That the re-issued patent is void, for the reason that it is for a different invention than that covered by the original patent; and

Second—That the defendant does not infringe.

The feature of the original patent brought in question by this suit is a device by which the lumber to be planed is held or pressed down to the traveling bed of the planing machine by means of two or more pressure rollers placed in a line across the bed of the machine so that their united length shall reach across the bed.

The original device as patented by Goodrich and Colburn, contained several features which the inventors seemed to think of much more merit than the special feature in question in this suit, and those elements or features formed the subject of the first three claims of the patent.

There is no proof in the record that a practical working machine embodying all the distinctive features of the original patent was ever made and operated for planing lumber, and the opinions of several witnesses of much experience in the working of this class of machinery are given in the proof to the effect that a useful planing machine could not be made by following the specifications and drawings shown in the patent.

It also appears from the proof that in the year 1877 the complainant company and another manufacturer of planing machines made and put upon the market machines containing

among other features, divided or broken pressure rollers. These machines proved useful and acceptable to the trade, and in August, 1878, undoubtedly for the purpose of securing to this complainant the exclusive right or monopoly in the market for this class of machines, Mr. Doane, president of the complainant company, secured from Goodrich and Colburn an assignment of their original patent, and obtained the re-issue now before the court.

The original patent contained four claims; the three first of which relate to features not involved in this suit, and the fourth claim was intended to cover so much of the device as related to the divided or broken pressure rollers. The re-issued patent contains eight claims; the first four being substantially the four claims of the original patent, and the fifth, sixth, seventh and eighth, all relate to the divided pressure rollers and are intended to claim and cover more fully and particularly this character of the machine.

The fourth claim of the original and re-issued patent in substance is for "the combination of the springs E 4, E 4, with the yokes E 3, E 3, the frames E 2, E 2, E 1, E 1, and the rollers E, E, as herein described and for the purposes set forth." The new claims in the re-issue state more minutely the operation of the machine and the combinations of these parts with the traveling bed, and other parts of the machine. If these new claims are intended to be and are an expansion of the claims of the original patent so as to enable the present owners of the patent to claim elements which the original patentees did not see fit to claim, then they are undoubtedly void under the rule established by the Supreme Court in *Miller vs. Brass Company*, 104 United States, 350, and *Campbell vs. James*, Id. 356. While if these new claims are only re-statements of the functions and mode of operation of the elements of the fourth claim in combination with the other parts of the machine, then they are but an-

other mode of formulating the old fourth claim. The original fourth claim was for the rollers, frames, yokes and springs as shown and described in the specification, acting of course through and with the other parts of the mechanism to make an operative machine, and in my estimation, a claim of a combination of those elements of the fourth claim with the other parts of the machine does not add anything to that old fourth claim, because the operation of those elements with the other parts of the machine, like the traveling bed or cutter heads, was implied or understood in the original fourth claim.

I shall, therefore, confine myself to the question whether the machine made by the defendant infringes on the fourth claim of the re-issued patent.

In the specification of the re-issue this feature of the patent is described as follows: "The pressure rollers E, E, figures 2, 3 and 4 are connected to independent swinging arms, E 1, E 1, E 2, E 2, so that they are free to follow the surface of the article to be planed, the journals of the rollers having boxes so arranged that this action can take place; E 3, E 3, figure 4, are yokes, the ends of which rest upon the arms E 1, E 1, E 2, E 2, upon the middle of these yokes E 4, E 4, press, so that the arms E 1, E 1, E 2, E 2, are pressed constantly downward against the work." It will be seen from this description that the independent swinging arms which carry upon their forward ends the pressure rollers are a distinctive feature or element of the complainant's device. The function and mode of operation of these swinging arms is such that either end of the roller may rise without raising the opposite end, thus giving to these rollers an adjustable element which enables them to adapt themselves to the surface of the lumber on which they operate.

The defendant's machine contains a divided roller, or two rollers, the united length of which reaches across the bed of

the machine, but these rollers are fixed on rigid frames which have only a vertical motion, and the rollers cannot be tilted or one end raised while the other remains stationary or is not raised so much. There is nothing in defendant's machine which corresponds to these swinging arms in complainant's machine, or which can be deemed the equivalent of these arms. The characteristic which these arms impart to complainant's device, is not found in defendant's machine. The defendant's rollers must rise vertically in a line perpendicular to the bed of the machine.

If complainant by the new claims in the re-issue, intends to cover all divided rollers, or machines where transverse pressure rollers are used in sections or parts, then the proof shows that more is claimed than can be allowed by the state of the art when these patentees entered the field, because the English patent to Gracie, clearly shows several pressure rollers, acting independently across the bed of a planing machine; and the same feature is also shown in several other English patents which are in proof, although not so nearly identical in mode of operation and effect as those shown in the Gracie patent.

I am, therefore, of the opinion that the true and only allowable construction of complainant's patent requires that the pressure rollers shall be used in combination with the independent swinging arms which are described in the specifications, and that complainant cannot by the re-issue be permitted to expand the claims of the patent so as to cover all divided or broken pressure rollers; and inasmuch as defendant does not use the swinging arms, nor the complainant's combination of those arms with his pressure rollers, there is no infringement.

The bill is dismissed for want of equity.

WESTERN ELECTRIC LIGHT COMPANY vs. CHICAGO ELECTRIC LIGHT MANUFACTURING COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—DECEMBER, 1882.

IN EQUITY.

1. PATENTS—ELECTRIC INDICATORS FOR ELEVATORS—NOVELTY.—The Gray and Hahl patents for improvements in electric indicators for elevators, each consisting of a mechanism whereby an electric current is maintained between the signal keys on different floors of the building, and the annunciator attached to the elevator car, without interruption by the movement of the car, and which allows the transmission of signals to a car when in motion, are not void for want of novelty.

2. INVENTION.—The fact that a patented device has been generally adopted for use, and that simultaneously a number of inventors gave their attention to the subject matter covered by that device, is evidence that it required inventive genius rather than mere mechanical skill to produce it.

3. INTERFERENCE.—The Commissioner of Patents has authority to declare an interference between an application for a patent, and a patent which has already been issued.

4. If the Commissioner of Patents, in case of interference, has, after hearing proof, decided in favor of one of the devices or inventions, a court upon the same proof will consider the decision of the Commissioner as settling the question of priority.

G. P. Barton and *Coburn & Thacher*, for complainant.

Merriam & Whipple, for defendant.

BLODGETT, J.—This is a bill to enjoin infringement by defendant of patent No. 172,993, issued February 1, 1876, to Elisha Gray (application for which was filed February 3,

1873,) for "an improvement in electric annunciators for elevators" and patent No. 148,474, issued March 10, 1874, to Augustus Hahl, (application for which was filed February 7, 1872,) for an "improvement in electric indicators for elevators;" both of which patents complainant claims to own, by assignment from the patentees, and no contest is made to complainant's title.

Defendant denies the validity of these patents:

First—For want of novelty.

Second—That Gray's patent was irregularly issued on an interference declared between the application of Gray and the patent of Hahl after the Hahl patent had been issued.

Third—That both patents, but especially that of Gray, are void for want of certainty in the description of the thing claimed to be invented.

Fourth—That each of said patents only shows an aggregation of parts which, in the combination, perform no new results.

The Gray patent showed two methods of connecting the annunciators in the elevator cab with the signal keys on the several floors and with the battery: one by means of a flexible cable of insulated wires, which was attached to the car with sufficient slack to allow the car to pass up and down the elevator well,—this is called the flexible cable method,—and the other by means of wires suspended upon or against the side or wall of the well, and with which wires projecting from the car and connected with the annunciator were kept in contact as the car passed up and down the elevator well—this latter is called the sliding or friction contact method—and the proof, without dispute, shows that Gray first conceived the idea of this device in the latter part of 1870, and between that time and March 1, 1871, he constructed and put in operation an electric annunciator in the elevator at the Palmer House in this city upon the sliding or friction contact method.

The Hahl patent also shows two methods of connecting the annunciators in the car with the signal keys and battery,—one by the flexible cable and the other by a friction contact device, although the minor details of each are somewhat different from that of Gray's.

While the Hahl application was pending in the patent office, interferences were declared between his device and pending applications for substantially the same thing, by Edwin Holmes and James Corey, which resulted in a decision by the Commissioner in favor of Hahl as the first inventor as against both Holmes and Corey, and the patent was issued to Hahl, dated March 10, 1874. After the patent had been issued to Hahl an interference was declared between the applications of Gray which had been filed in February, 1873, and Hahl, and pending this interference, after proofs had been taken, concessions were made between Gray and Hahl by which Hahl admitted Gray to be the prior and first inventor of the device contained and claimed in the first claim of the Gray patent, and Gray conceded to Hahl priority of invention of the flexible cable method of connecting the annunciator in the car with the signal keys and battery; the proof showing that although Gray may have conceived the idea of the flexible cable method prior to Hahl, yet Hahl was the first to embody that idea in a working mechanism, as well as the first to apply for a patent thereon.

After these concessions the Gray patent was issued with only one claim, as follows:

"The combination of a movable elevator car, an annunciator attached thereto and moving therewith, circuit closing or breaking signal keys on different floors, respectively, of a building, and mechanism whereby an electric current is maintained between the signal keys and the annunciator without interruption by the movement of the car."

Since the commencement of this suit, the complainant, as owner of the Hahl patent, has disclaimed so much of the

Hahl patent as claimed the sliding or friction method. These concessions and the disclaimer left the Gray patent covering only the general principle of connecting the annunciator in the moving car of an elevator with signal keys on the respective floors of the building and the battery by the means shown, but conceded the priority of the flexible cable method to Hahl.

The defense for want of novelty rests mainly on the patents of Holmes and Corey for similar devices, and the analogous devices of Foster, and the gas tube, by which gas is carried by means of a flexible tube to burners in an elevator car.

As to the Holmes and Corey patent it is sufficient to say that they were put in interference with the Hahl patent before the patent office, and the Commissioner, on proof, decided that the invention of Hahl was prior to that of either Holmes or Corey. This decision of the Commissioner may not be so wholly conclusive upon all the world as to prevent the citation of the devices of Holmes and Corey as anticipating the Hahl patent, but no proof is introduced on this trial which was not before the Commissioner on the interference, and it seems to me that there can be no doubt that the decision of the Commissioner was correct upon the testimony in the matter then before him, and that his award of priority to Hahl sufficiently disposes of the Holmes and Corey devices for the purpose of this case.

The Foster patents are for devices for transmitting signals by means of pneumatic tubes. Neither of them shows the application of the device to an annunciator in the car of an elevator while in motion; and even if they had shown such application of the Foster devices, I do not think a person could, without invention, from any hint or suggestion in the Foster devices, by mere mechanical skill adapt the system of electric calls used in Hahl's device to an elevator car. The

same may be said of the flexible gas pipe. Neither air working through a flexible pneumatic tube, nor gas passing through it for the purpose of illumination, are the electric fluid, and it required something more than was done either by Foster with his pneumatic tube, or whoever applied the gas tube, to apply electricity to the operation of an annunciator in a car in motion. The proof shows that since the Hahl and Gray patents this device has been generally adopted for use in elevator cars, and its adoption, and the fact that almost simultaneously quite a number of inventors—two of them, at least Gray and Holmes, well known to the public for valuable inventions in the field of electrical science—had given their attention to the subject matter covered by the devices now before us, is evidence that it required something more than mere mechanical skill to accomplish the result attained by this patent.

As to the second point, that this device shows only a mere aggregation of parts, and produces no new result, it is sufficient to say the result produced is the transmission of signals to a car *when in motion*, which was new and had never been produced until this combination, and that some of the parts in this combination perform a new function, and the whole combination produces a new result.

As to the objection that the Gray patent was irregularly issued, it is, perhaps, not material to the purposes of this case to consider that point seriously, because the defendant in this case is shown by the proof to only use the flexible cable method covered by the Hahl patent; but I have no doubt that under section 4904 of the Revised Statutes the Commissioner of patents had the right to declare an interference between Gray's application and the Hahl patent, as the statute expressly gives him the power to declare an interference between "any pending application and any unexpired patent." So, too, it seems to me that both patents are

sufficiently definite in their statements to describe and cover the invention claimed.

There is no controversy in this case on the question of infringement. The proof shows that the defendants have used, and are using, the flexible cable method shown and described in the Hahl patent. I can, therefore, see no reason why the complainant is not entitled to a decree and an accounting.

THE PHŒNIX MUTUAL LIFE INSURANCE COMPANY vs. JOHN H. WALRATH.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—JANUARY, 1883.

1. REMOVAL OF CAUSES.—APT TIME.—Under the Act of 1875, a cause cannot be removed from the State to the Federal Court after the term at which it first could have been tried in the State Court.

2. CAUSE CANNOT BE REMOVED AFTER ONE TRIAL IN STATE COURT, IF NEW TRIAL IS GRANTED.—Suits which have been commenced since the passage of that act cannot be removed after there has been one trial in the State Court; and the fact that the State Supreme Court reverses the judgment in the first trial, and remands the case for a new trial, and new issues are made in the case, does not give a right of removal after having been tried once.

Motion to remand cause to the State Court from which it was removed to this court.

The facts are that this action was commenced in July, 1880, in the Circuit Court of Milwaukee county, Wisconsin. Is-

sue was joined therein by the service of an answer on the 26th day of August, 1880. The cause was duly noticed for trial for the October term of the State Court of that year, and was placed on the calendar of that court for trial at that term, which was the first term at which it could be tried after issue was joined therein. It was, however, not tried at that term but was tried at the January term, 1881, before the court and a jury, the trial resulting in a verdict for the plaintiff, upon which judgment was duly entered.

The original answer was a general denial, and on the trial the defendant asked leave to amend his answer, but the court refused leave, and excluded testimony which it was understood would have been competent not only under the proposed amended answer but under the original answer. These rulings were excepted to and an appeal was taken by the defendant to the Supreme Court of the state. That court reversed the judgment of the court below and remanded the case for a new trial. The case was thereafter duly noticed for trial for the May term, 1882, of the Milwaukee County Circuit Court, and was placed on the calendar for trial. Subsequently, and on the 20th day of May, 1882, the defendant applied for permission to file an amended answer. The court permitted such answer to be filed, and as the same contained allegations constituting a counter claim, the plaintiff was allowed twenty days to reply thereto, and the cause by order of the court stood for trial at said May term. On the 31st day of May, the plaintiff served on the defendant an order requiring him to show cause why a bill of particulars of the defendant's demand should not be served, and staying proceedings on the part of the defendant until the hearing and decision of said motion. The motion was heard and denied on the 6th day of September, 1882, which was after the expiration of the May term of the court. The plaintiff was then allowed fifteen days to reply to the defendant's counter

claim. Before the time thus granted in which to file a reply expired, and on the 14th day of September, 1882, the plaintiff procured the cause to be removed to this court under the removal act of 1875.

The first term of the State Court at which the case could be tried after the decision of the motion for a bill of particulars, and after the plaintiff was allowed fifteen days to reply to the defendant's counter claim, was the October term, 1882.

The defendant moved to remand the cause to the State Court on the ground that, at the time of the removal of the same to this court, it was not removable under the act of 1875.

Finches, Lynde & Miller, for plaintiff.

Jenkins, Elliott & Winkler, for defendant.

DYER, J.—Much of the argument of counsel on both sides proceeded on the theory that the case was removable after its return from the Supreme Court of the state to the court below; and in that view there was extended discussion of this question, namely: what was the first term of the State Circuit Court after the reversal of its judgment by the Supreme Court, when the case, in the then state of the record, could be first tried?

But the vital question to be here considered lies back of that, and is this: was the case removable to this court under the act of 1875, after the trial thereof in January, 1881?

Before the passage of the act of 1875, there had been considerable controversy in the courts as to the time with reference to a trial in the State Court, when a cause could be removed.

In *Insurance Co. vs. Dunn*, 19 Wallace, 214, the court, construing the act of 1867, held that under that act, a case could be removed after a trial on the merits, if the statute of the state, as in Ohio where the case arose, gave to the defeated party the right to a second trial; in other words, that under that act a case could be removed at any time before *final* trial. In the Revised Statutes (sub. 3, section 639,) the words of the act of 1867 were changed from "final hearing or trial" to "trial or final hearing" as in the act of 1866; and then followed the act of 1875 which was clearly intended to abridge the time within which such suits could be removed from the State to the Federal Court.[1]

Section 3 of the act of March 3, 1875, provides "that whenever either party, or any one or more of the plaintiffs or defendants, entitled to remove any suit mentioned in the next preceding section shall desire to remove such suit from a State Court to the Circuit Court of the United States, he or they may make and file a petition in such suit in such State Court, before or at the term at which said cause *could be first tried and before the trial thereof* for the removal of such suit into the Circuit Court," etc.

Then by section 2 it is provided, "that any suit of a civil nature, at law or in equity, *now pending*, or hereafter brought in any State Court where the matter in dispute exceeds," etc., may be removed into the Circuit Court of the United States; thus making the act apply to suits pending at the time of the passage of the act.

The clear meaning of these two sections when considered together is, that where a case was pending in the State Court at the time of the passage of the act, it could be removed to the Federal Court if the application for removal

[1] *Newdecker vs. Rosenbaum*, 19 Blatch. 85.

was thereafter seasonably made and if it was otherwise removable, notwithstanding there might have been a trial in the State Court before the passage of the act. But as to any and all cases brought in the State Court subsequent to the passage of the act, there could be no removal after a trial in that court; because the words of the statute are that the application for removal must be made before or at the term at which the cause could be first tried and before the trial thereof. The language of the act means, in regard to suits pending when the act was passed, the first trial after the right of removal attached subsequently to the passage of the act.[1] And obviously its language in regard to suits thereafter brought, means the term after such suits are begun, when a trial could first be had.[2]

The case of *Hewitt vs. Phelps*, 105 United States, 393, much relied on by the learned counsel opposing this motion, it will be noticed, was one that was pending in the State Court when the removal act of 1875 was passed. It was commenced in 1869 and dismissed on final hearing in 1874. An appeal was taken to the Supreme Court of Mississippi, the decree of dismissal was reversed and the case came back to the court below for further proceedings in conformity with the opinion of the Appellate Court, and thereafter the case was removed to the Federal Court. It was therefore a case coming within the second section of the act, as a case then pending, with a right of removal existing at the time it was removed which was before the first term at which it could be first heard or tried after the passage of the act; and therefore came directly within the ruling made in the *Removal cases*, 100 United States, 437.

[1] *Hoadley vs. San Francisco*, 8 Sawyer, 553–555; *Neudecker vs. Rosenbaum*, *supra*.

[2] *Bible Society vs. Grove*, 101 United States, 610.

The case at bar was not pending when the act of 1875 was passed. As we have seen, it was commenced in 1880. There was a trial at the January term, 1881, of the State Court. That trial was followed by an appeal and a reversal of the judgment of the court below, and the case came back for a new trial. Then for the first time there was an application for removal. That application came too late because in such a case the statutory requirement is imperative that the removal must be made before there is any trial of the suit in the State Court.

As the suit was not brought in the State Court until after the act of 1875 was passed, it cannot help the party here petitioning for a removal, that the judgment which followed the first trial was reversed, and that the case came back to the Circuit Court of the state for a new trial. It was not removable after the October term, 1880, of the State Court and the motion to remand must be granted.

UNITED STATES vs. CHARLES GAYLORD.

District Court—Southern District of Illinois—January, 1883.

1. Non-Mailable Matter when Inclosed in Sealed Envelope.—Since the statutes relating to mailing non-mailable matter was amended by the insertion of the word "writing," all writings whether inclosed under a sealed envelope or not, signed or unsigned, that are of an obscene, lewd or lascivious character, are non-mailable matter, and covered by the statute.

2. Publication of Writing.—Inclosing an obscene, lewd or lascivious writing in a sealed envelope and mailing it to another, constitutes a publication of the writing.

This was an indictment under section 3893, U. S. Revised Statutes, for mailing obscene writings. There were three counts, each charging defendant with "depositing in the mail of the United States, for mailing and delivery a certain obscene, lewd and lascivious writing purporting to be a letter, etc., which said writing is so lewd, lascivious and obscene that the same would be offensive to the court here and improper to be placed upon the records thereof, which said writing then and there was enclosed in a letter envelope, said letter being then and there addressed," etc. A motion was made to quash the indictment on the ground that the obscene, lewd and lascivious expressions were not set forth in the indictment, which motion was overruled by the court.

Defendant thereupon entered a plea of guilty and moved for arrest of judgment—*first*, on the ground that the statute did not include private communications which were sent under cover of a seal, such as letters, etc., but was intended to embrace only such matter as was classed under the head of publications, such as circulars, etc., which were sent sub-

ject to the scrutiny of postmasters, and to be detained by them in case of their being determined to be non-mailable matter—and *second*, that the sending of such letters did not constitute a publication of the writings therein inclosed.

James A. Connolly, U. S. District Attorney, and *Edward Roe*, Ass't U. S. Attorney, for United States.

John M. Palmer and *James C. Robinson*, for defendant.

TREAT, J. (orally)—Since this statute has been amended by the insertion of the word "writing," I am of opinion that all writings, whether inclosed under a sealed envelope or not, signed or unsigned, that are of an obscene, lewd or lascivious character, are non-mailable matter, and covered by the statute.

As to the question raised regarding what constitutes a publication, I shall hold: That to inclose an obscene, lewd or lascivious writing in a sealed envelope and mail it to another is a publication of that writing, and would place it within the power of the party receiving the letter to institute a prosecution for the offense.

GEORGE THOMPSON vs. AMANDA E. HAWKS *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—JANUARY, 1883.

WILLS—UNDUE INFLUENCE OF SPIRITUALISM.—Where a person in a weakened state of mind embraced spiritualism and came under the influence of a spirit medium and was thereby alienated from his only son and child, and willed his property to the medium, disinheriting his child: *held*, that the will made under such circumstances was invalid and would be set aside.

John H. Stotsenberg and *D. C. Anthony*, for complainant.

A. Dowling and *La Follette & Tuley*, for defendants.

GRESHAM, J.—John Thompson died in Louisville, November 14, 1877, aged 76 years, leaving a will, which was executed February 25, 1875, in New Albany, by the terms of which he bequeathed all his property to Mrs. Amanda E. Hawks, who is one of the defendants. George Thompson, the plaintiff, is the only child of the testator, and brings this suit against Mrs. Hawks and her husband to set aside the will on account of the mental incapacity of the testator, and the undue influence of the devisee over him. The reasons assigned by the testator in his will for disinheriting his son are his neglect of the testator during the last illness of his second wife, and during his own illness in the winter of 1873, and the circulation of injurious reports concerning him by his son. Without stopping to detail the testimony, or the relations of the father and son for several years previous to the death of the former, it is sufficient to say that the accusations in the will against the son seem to have been the result of a delusion. Whatever disagreements there may have been

against them, their relations are not shown to be so inharmonious as to account for the strange and unnatural disposition which the father attempted to make of his property.

Mrs. Hawks knew the family of John Thompson as early as 1856. For some time she lived near them and under the same roof in New Albany. In 1860 she removed to Louisville. The friendly relations between herself and the Thompson family continued after her removal, and when the second wife of the testator died and when he became sick, she visited their house frequently and attended to their and his wants. Some time after 1870, Mrs. Hawks became what is known as a spirit medium, and the testator became much interested in spiritualism, and visited her often and regularly. Previous to that time, and during his visits in Iowa, he had exhibited signs of mental aberration in his intercourse with his relatives and acquaintances there. He had a sister and a niece who were deranged and in an insane asylum. Mrs. Hawks made him acquainted with the mysteries of spiritualism; she undertook to "develop" him, and enable him to become a medium who could communicate directly with the spirits of the dead. He began to talk among his acquaintances about sending and receiving messages to and from his deceased wives. He endeavored to obey sedulously every trivial injunction that he received in this way from them, even to keeping the cow away from the rose bushes in his yard. He carried a little basket on his arm on his visits to Mrs. Hawks, in which he told some of the witnesses he was taking coffee and delicacies to Mrs. Hawks for his deceased wives, which Mrs. Hawks would forward to them, and at least one of these visits was made in the same month that the will was executed. He began to talk freely about disposing of his property to keep it out of his son's hands, and about disinheriting his son, although, strange to say, Mrs. Hawks testifies that nothing on these subjects ever passed

between them, notwithstanding their great intimacy. On January 29, 1874, he did convey his real estate in New Albany to Mrs. Hawks, for the consideration of $2,800, which she says she paid him in money in the recorder's office, in New Albany. There is no other witness of the payment. She was then the wife of a poor shoemaker, with two children, sixteen and seventeen years old. She says that her husband had inherited $500 of this sum, and she had a legacy, the amount of which is not stated. On July 28, 1875, she obtained a quit-claim deed from the testator to the same property, for which she paid $50. On January 7, 1876, she re-conveyed this property to the testator for $2,900.80, taking his notes for $1,652.30, secured by mortgage on the property, and receiving the balance in money. She gives as the reason for the re-conveyance that having failed in two lawsuits against George Thompson for having erected buildings on the ground adjoining hers, which darkened her windows and damaged her property, she became dissatisfied with it, and the testator took it back to please her, at the price mentioned. But it is also worth mentioning, that between the original conveyance to her and the conveyance back to the testator he had made his will leaving everything to her.

Before and after the conveyances to Mrs. Hawks, and the execution of the will, the testator informed several persons that he had been directed by the spirits of his deceased wives, through Mrs. Hawks, to dispose of his property; that he had been advised by them that it was necessary for his development to do so; and that he had received sundry warnings against his son, and injunctions to "do well by" Mrs. Hawks, from the same source. Numerous acts of eccentricity are detailed by the testimony, which it is useless to recapitulate. There is some evidence tending to show that the husband of Mrs. Hawks was addicted to drink, and was unable to provide his wife with the commonest neces-

saries of life; that Mrs. Hawks expected to inherit a fortune from the testator; and that he had money and bonds which have not been discovered since his death. The general agreement of all the plaintiff's witnesses—of those in New Albany, in Ohio, in Kentucky and in Iowa—is a strong corroboration of the testimony of each of them. Several credible and disinterested witnesses, with good opportunities for estimating the mental condition of the testator, testify that they think he was sane, but they never observed those acts which impressed other witnesses with a different belief, and their testimony ought not to outweigh the positive testimony of those who were cognizant of unmistakable evidences of a disordered mind.

It is useless to discuss here the proposition as to whether or not a spiritualist cannot make a valid will, or as to whether or not a man who has a monomania on one subject is capable for the general transaction of business which does not concern that subject. The testator was in a weakened state of mind when he came under the influence of a spirit medium. He embraced spiritualism as practiced by the spirit medium. and instead of merely believing in it as an abstract proposition, he became possessed by it and suffered it to dominate his life and override every other consideration. His belief in it was artfully used by the spirit medium—the only one, it appears, whom he ever consulted—to alienate him from his only son and child, and to get his property.

A will made in such a mental condition and under such influences ought to be set aside.

Finding and judgment for the complainant accordingly.

THOMAS S. McCLELLAND, Receiver., etc., vs. SIMEON WHITELEY.

Circuit Court—Eastern District of Wisconsin—January, 1883.

1. Corporations—Subscription to Stock.—In order to hold a person liable as a subscriber to stock in a stock company, it must be shown that he subscribed a contract to take stock in the company, or authorized some one to subscribe such contract for him, or that with knowledge that a subscription had been made in his name, he ratified the act.

2. Entering one's name in the personal memorandum book of the president of a stock company with the amount and number of shares which he orally agrees to take upon a certain contingency, which book at the time had nothing about it to show that it was to contain a list of stock subscribers—cannot be construed as a subscription for stock.

3. Executing Proxy not Necessarily Ratification of Subscription by Another.—And if such person subsequently, at the request of the president, signs a proxy authorizing the president to vote for him the same number of votes as he would be entitled to if personally present, no particular meeting being specified and no stock having been actually issued, this would not be a ratification of the president's act in placing such person's name on the subscription books of the company, if, in fact, such act was unknown to him at the time.

4. Service of Process—Res judicata.—A person sued on a stock subscription by a receiver appointed in proceedings to which he was only brought in by publication, is not bound by the decrees in such proceeding affecting his liability, and may defend on the merits.

Jenkins, Elliott & Winkler, for plaintiff.

Fish & Dodge, for defendant.

Dyer, J.—The plaintiff in this action sues to recover upon an alleged subscription by the defendant of $2,000 to the capital stock of a corporation now dissolved, known as the Chicago Publishing Company, incorporated and organized in

1877, under the laws of Illinois. One O. A. Willard, since deceased, was the largest stockholder, and the president and business manager of the company.

In July, 1878, the Rock River Paper Company, a creditor of said corporation, filed its bill against the Publishing Company, and all the alleged stock subscribers of that company in the Superior Court of Cook County, Illinois, to wind up the affairs of the company, and to compel the payment of all subscriptions to stock, for the benefit of creditors. The defendant herein was made a party to that bill. As he was a resident of Wisconsin, no personal service of process could be made upon him, but jurisdiction over him was attempted to be obtained by publication in a manner said to be authorized by the laws of Illinois. In that suit the plaintiff herein was appointed receiver of the property and effects of the Publishing Company, and subsequently a decree was entered by which it was, among other things, decreed that all of the solvent stockholders or subscribers to the capital stock of said corporation, including the defendant herein, pay, or cause to be paid, to the plaintiff receiver, the several sums of money alleged to be due from them respectively on account of their subscriptions to the stock of the company. Subsequently the Illinois court made a further order authorizing and directing the receiver to prosecute suit against the defendant herein to recover the amount of his alleged subscription, and it is understood that the various proceedings in the Illinois case were in accordance with the statutes of that state authorizing the same.

The case at bar was submitted to the court without the intervention of a jury, and upon the argument it was contended by counsel for the defendant that the right or capacity of the receiver to sue was limited to the jurisdiction of the court that appointed him, and that he could not come into this jurisdiction and, as receiver, prosecute this suit

against the defendant. Further, that the receiver cannot maintain this action, because he shows no judgment of the court appointing him, which is conclusive against the defendant. In the view which the court takes of the merits of the case, it is unnecessary to pass upon these questions.

Since the Superior Court of Cook county did not get jurisdiction of the defendant by personal service of process upon him, and as, therefore, its decree was not conclusive as to him, it cannot be denied, and indeed it is admitted that he may make here the same defense upon the merits that he could have made in the Illinois suit had he appeared therein and contested the question of liability.

The material question for determination then is, did the defendant, upon the facts here shown, incur liability as a stock subscriber of the Publishing Company? If he did, then he ought to contribute with other stockholders to the payment of the debts of the corporation. The stock subscription book is in evidence, and the name of the defendant appears therein as representing a subscription for twenty shares amounting to $2,000. It is satisfactorily shown, however, and this was conceded by counsel for the plaintiff after the proofs were in, that the defendant's signature on the stock book was not in his handwriting, and was not his genuine signature. That it was written in imitation of his signature is apparent.

Enough is disclosed by the evidence to show that in January, 1878, Willard, who had authority to solicit stock subscriptions, came to Racine, where the defendant resided, and requested him to become a subscriber. The defendant told him he was not in a situation to engage in a joint stock enterprise. This is shown by the testimony of the plaintiff, who testifies to statements made to him by the defendant concerning the defendant's interview with Willard. Further con-

versation on the subject was had between Willard and the defendant, but precisely what was said is not directly proven, for the reason that Willard is deceased, and therefore, under the statute, the defendant was not a competent witness to testify to conversations between the parties. The answer alleges that as the result of the negotiations, the defendant told Willard that if he could secure the appointment of United States Consul at Bradford, England, he would be able to take and pay for stock to the amount of two thousand dollars. But notwithstanding this *hiatus* in the proofs, enough appears to quite clearly indicate that the defendant was not then prepared to make a subscription, but that in certain contingencies he would be willing to do so. Thereupon Willard presented to the defendant a memorandum book and the defendant wrote therein, "Simeon Whiteley—2,000—20," the figures evidently meaning $2,000—20 shares. It is satisfactorily shown that this book was Willard's personal memorandum book and not the stock book of the company. There was one other signature on the page upon which the defendant thus wrote his name, but nothing was written on the pages which preceded these signatures. The fact is not clearly proven, but the whole evidence and the circumstances of the transaction, I think, warrant the inference that the defendant wrote his signature in the manner stated, not as a present subscription, but as indicative of what he would be willing to subscribe in a certain event; for it is clearly demonstrated that he never subscribed for stock in the subscription book of the company, and he has testified unqualifiedly that he never authorized Willard or any other person to subscribe for him, or to place his name on the company's stock book, and his testimony is not impeached.

After the death of Willard, the book which contained the defendant's signature was found by his wife among his per-

sonal effects, and on the leaves which preceded the page on which the defendant signed his name, there had been written a list of the stock subscribers of the company with the amount and number of shares subscribed by each in substantially the same order in which the names of subscribers appear on the genuine stock subscription book of the company. At the top of each page were also written in appropriate places the words "names" —— "amount" —— "shares." On the first page of the first leaf was written in the handwriting of Willard, "Chicago Publishing Company. Capital stock, $150,000;" and on the second page of the same leaf was written also in the handwriting of Willard, a form of subscription for stock, which is in fact a copy of the subscription signed by actual subscribers. These leaves were removed from the book which contained them, by Mrs. Willard after her husband's death, for reasons stated in her testimony, and are here produced in evidence; and the witness, Harriet Dewey, who was in the employment of the Publishing Company as a clerk, testifies that by Willard's direction she wrote the list of signatures on the pages which preceded the defendant's name after his signature was written therein, thus corroborating the defendant's statement that nothing was written on those pages at the time of his interview with Willard.

After Willard's death and on the 13th day of May, 1878, Mrs. Willard, who was then the business manager and treasurer of the Publishing Company, finding the defendant's name on the stock subscription book and undoubtedly supposing him to be a stock subscriber, sent him by mail a certificate for twenty shares of stock, but he immediately returned it and made no payment on account thereof.

It further appears as a fact in the case, that on or about the 18th day of February, 1878, Willard sent to the defendant a blank proxy to vote on stock at a stockholder's meeting there-

after to be held. This proxy the defendant filled up, signed and returned, and thereby in terms constituted Willard attorney and agent for him and in his name and stead to vote as his proxy at any and all meetings of the stockholders of the Publishing Company according to the number of votes he should be entitled to vote if personally present. The defendant testifies that the letter in which the proxy in blank was sent to him, did not, according to his recollection, contain any notice of a stockholders' meeting; that he did not then know that his name appeared on the company's stock book as a subscriber for stock, and that he signed the proxy for the reason that whenever the anticipated time arrived when he should take stock in the company, he desired Willard to have entire control of it.

It appears from the secretary's record that subsequently a stockholders' meeting was held and that Willard voted or appeared at such meeting not only for himself but as the defendant's proxy. There is, however, no proof that the defendant at the time, or subsequently, had any knowledge of those proceedings.

There is nothing in the evidence tending to show that the act of Willard in causing the list of stock subscribers and the form of a subscription to be placed on the leaves in his memorandum book which preceded the page on which the defendant's signature was written, was done with the authority, consent or even the knowledge of the defendant, and to the point in the history of this transaction when that event occurred, the proofs are wholly inadequate to show that the defendant became a subscriber to the stock of the corporation. He had not made a subscription on the stock book of the company. He had told Willard he was not in a situation then to engage in the enterprise. He had written his name on a blank page of Willard's private memorandum book and placed $2,000 opposite his signature. The heading, the list

of actual subscribers and the words "amount" and "shares" were written there afterwards without his authority or knowledge. He gave Willard no authority to place his name upon the stock subscription book of the company and he executed the proxy under the circumstances stated.

Argument is not needed in support of the proposition that to entitle the plaintiff to recover, it must be established by the evidence, that the defendant subscribed a contract to take stock in the Publishing Company, or that he authorized some person to sign such a contract for him, or that in the absence of such original authority, with knowledge that a subscription had been made in his name, he ratified the act. The first and second of these propositions of fact are not only not proved but are affirmatively disproved. The only question about which the court has been at all in doubt is that which relates to the effect upon the rights of the parties in interest, of the proxy given by the defendant to Willard, February 18, 1878. It is true that the proxy enabled Willard to represent the defendant at a stockholder's meeting and to vote as his proxy according to the number of votes the defendant would be entitled to vote if himself present. But in fact the defendant had not yet subscribed for any stock, and was therefore not entitled to vote at such meeting by virtue of any actual subscription. The most, therefore, that can be claimed as the legal effect of the proxy is, that the defendant thereby ratified the act of Willard in placing his name on the stock subscription book of the company. But it is in proof that the proxy was sent only in anticipation of a future subscription which was never made, and that the defendant had no knowledge that Willard had placed his name on the company's stock subscription book. On the subject of ratification "no doctrine is better settled," said the court, in *Owings vs. Hull*, 9 Peters, 629, "both upon principle and authority, than this; that the ratification of an

act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts." To the same effect are *Combs vs. Scott et al.*, 12 Allen, 493, and *The Pittsburg & Steubenville Railroad Company vs. Gazzam*, 32 Pennsylvania St. 340. In order, therefore, to treat the execution of the proxy as a ratification of the act of Willard in placing the defendant's name on the company's subscription book, it should appear that the defendant had knowledge of Willard's act. And since it is affirmatively shown that he had no such knowledge and never authorized that act to be done, and further that he had not previously subscribed for stock, and had given no one any authority to subscribe for him, it seems to follow as a necessary conclusion that the giving of the proxy cannot have the legal effect claimed by the plaintiff.

The case has been argued by plaintiff's counsel upon the theory throughout that the defendant agreed to subscribe for stock. This is not proven and the allegation of the answer on the subject does not sustain such theory. That allegation is that the defendant told Willard that if he secured a certain appointment he would be able to take and pay for two thousand dollars of stock, and that as a memorandum of such proposition he wrote his name in Willard's memorandum book. The case is not one of a signature to a contract of subscription with amount, number of shares and the like left in blank, and the blank to be filled by the representative of the company. It is not the case of an actual signing of a contract of subscription with an oral understanding making it conditional. It is a case where the party did not subscribe, did not authorize any one to subscribe for him, did not make legal ratification of an unauthorized act, and according to the proofs and the allegations of the answer, did not even agree unqualifiedly to take stock in the future. In such a case it is plain that creditors of the corporation have no

greater rights or equities, so far as the defendant is concerned, than the company had.

I have carefully examined the case of *Jewel et al. vs. The Rock River Paper Company et al.*, 101 Illinois, 57, and find nothing therein in conflict with the conclusions arrived at in the case at bar.

In *The Union Mutual Life Insurance Company vs. The Frear Stone Manufacturing Company et al.*, 97 Illinois, 537, the parties sought to be charged, were actual subscribers, for stock, and it was held that as such subscribers they could not limit their liability by agreement between themselves and the company.

Judgment must be entered in favor of the defendant.

AUGUST J. JOHNSON *et al* vs. HANOVER FIRE INSURANCE COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1883.

1. PROCESS MAY BE SERVED UPON FOREIGN INSURANCE COMPANY BY SERVICE UPON ANY AGENT.—A foreign insurance company doing an insurance business in the state of Illinois may be served with process of law by service upon any of its agents in accordance with section 5 of the Practice Act, and it is not necessary that the service be had upon the agent designated by the company in pursuance of section 22, chapter 23 of the Illlinois Revised Statutes as a person upon whom process may be served.

2. The statute requiring foreign insurance companies to appoint an agent upon whom process might be served did not contemplate that service could be had upon no other agent than the one so designated.

3. LOCAL AGENT MAY BE SERVED WITH PROCESS FOR THE COMPANY.—A local agent of an insurance company who obtains risks for the company may be served with process in the name of the company as an agent of the company.

B. D. Magruder, for plaintiffs.

W. I. Culver, for defendant

BLODGETT, J.—This is a suit on a policy of insurance alleged to have been issued by defendant to plaintiffs.

The defendant is a corporation created and existing under the laws of the state of New York.

The return of the marshal shows service of the summons "by delivering a copy thereof, and also by reading the same to Carl A. F. Henicke and Joseph Schoeniger, agents of said defendant."

The defendant has entered a special appearance, and moved to quash and set aside service of summons, because Henicke and Schoeniger, on whom process was served, were not the agents of the defendant for that purpose; but that defendant, when it began the transaction of insurance business in the state of Illinois, in compliance with the statute of this state, duly appointed one George D. Gould, who was then, and now is, a resident of Moline, in the county of Rock Island, in this state, its attorney in this state, on whom process of law could be served, a copy of which appointment was duly filed, and still remains in the office of the auditor of public accounts in this state; and that such attorneyship and agency still remain in full force, and no other attorney for such purpose has been appointed, therefore defendant insists that it could only be served with process in said cause by service on the said Gould.

By the 22d section of chapter 73 of the Revised Statutes of this state entitled Insurance, it is provided that "it shall

not be lawful for any insurance company, association or partnership, incorporated by, or organized under, the laws of any other state of the United States, or any foreign government, * * * to take risks or transact any business of insurance in this state, * * * unless such company desiring to transact any such business, as aforesaid, by any agent or agents in this state, shall first appoint an attorney in this state on whom process of law can be served, and file in the office of the auditor of public accounts a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney is substituted, and any process issued by any court of record in this state, and served upon such attorney by the proper officers of the county in which said attorney may reside or may be found, shall be deemed a sufficient service of process upon such company, *but service of process upon such company may also be made in any other manner provided by law.*"

Under section 5 of chapter 110 of the Revised Statutes of this state, entitled Practice, as amended by the act approved March 29, 1877, it is provided that "An incorporated company may be served with process by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal director, engineer, conductor, station agent or any agent of said company found in the county."

It was admitted on the argument, and it also appears by proof from affidavits on file, that Henicke and Schoeniger, on whom the summons in this case was served, were, at the time of such service, the local agents of the defendant in the city of Chicago; that they, as such agents, issued to plaintiffs the policy of insurance declared upon and countersigned the same; that after the loss by fire of the property claimed

to have been covered by the policy, said Henicke and Schoeniger accepted and transmitted to defendant the proofs of loss required by the policy, and conducted negotiations looking to the settlement of plaintiffs' claim for such loss. The service of the summons in this case having been made upon the agents of the defendant with whom the plaintiffs dealt, the single question raised by this motion is, whether a foreign insurance company, doing business in this state, can only be served with process by serving on the agent appointed for that purpose by the company, in pursuance of the provisions of section 22, chapter 73, above quoted.

Section 5 of the chapter regulating practice, as it appears in the Revised Statutes of 1874, is a substantial re-enactment of the act of February 8, 1853, in regard to the service of process on corporations; and section 22 of the insurance chapter is one of the provisions of the insurance law, approved March 11, 1869. And at the time the act of 1869 was adopted, the Supreme Court of this state had decided in *Mineral Point R. R. Co. vs. Keep*, 22 Ill. 9, that the provisions of the act of 1853 were not confined to domestic corporations created and doing business under the laws of this state, but were equally applicable to foreign corporations doing business in this state, who had agents or property here; and the Supreme Court of this state had also held in *Peoria Insurance Co. vs. Warner*, 28 Ill. 429, that this act of February, 1853, was a remedial act and to be liberally construed.

It will, therefore, be seen that at the time the clause requiring foreign insurance companies doing an insurance business in this state to appoint an agent on whom process of law could be served was passed, there was already ample provision for service of process on such corporation, and the act of 1869 expressly states that the service on the agent so to

be appointed was not the only mode of obtaining service on such company.

I, therefore, think that the natural and reasonable inference as to the legislative intent is that the purpose of the act of 1869 was to compel foreign insurance companies who entered upon an insurance business in this state, to so authenticate the agency of some person on whom process could be served that such company would be concluded by service on such agent or person. If process was served on any other person under the assumption that he was the agent of such company, the company could dispute such agency, probably, even after judgment, if judgment was taken by default; *Mineral Point R. R. Co. vs. Keep*, 22 Ill. 16; *Sibert vs. Thorp*, 77 Ills. 43; *Protection Life Ins. Co, vs. Palmer*, 81 Ills. 90; and therefore citizens of this state having a right of action against such foreign companies might be put to much trouble in proving the agency of the person on whom the process was served.

It was, therefore, as I think, to save this annoyance and trouble to persons bringing suit in this state against such companies, that the act of 1869 was passed. But I do not think the Legislature intended to enact, that process can only be served on an agent appointed under section 22 of the insurance law. To hold that service can only be made on the agent appointed under the insurance law, practically annuls the last clause of the said section which declares that the service may also be made in any other manner provided by law. There was another manner provided by law at the time the act of 1869 was passed, and it has not been repealed, but remains in full force, and the Supreme Court of this state in *H. & St. J. R. R. Co. vs. Crane*, 102 Ills. 249, has recently reaffirmed the principle of *Keep vs. Mineral Point R. R. Co.*, and said, "It does not require a liberal construction to bring foreign corporations within the act. The provision is

that 'in all cases where suit has been, or may hereafter be brought against an incorporated company, process shall be served.' Language more comprehensive could scarcely have been employed. It says, any corporation, without the slightest reservation or limitation. A thing may be embraced in the provisions of a statute by being specifically named or by being embraced in a class that is named. * * * It would have been no more comprehensive had it said all corporations of every kind, whether domestic or foreign, doing business in this state."

Although the suit in which the opinion from which the last citation was made was against a railroad company, there is nothing, either in the law itself or in the comments of the court, indicating that insurance corporations are any exceptions to the rules there laid down. The construction contended for by the defendant would give foreign insurance companies an advantage in this state over home or domestic corporations, by requiring that service of process could only be made upon a single individual representing the foreign company, while the domestic company could be reached by service "upon any agent," found within the county or district, in the absence of the president or other superior officers. I cannot believe that the Legislature intended to give foreign companies any such advantage, but rather intended that the company should be required to appoint an agent in such manner as to estop it from denying or questioning the validity of a service when made on him, leaving it for suitors to make their election whether they would serve the agent thus appointed, or take the risk of proving the agency of any other agent upon whom service could be obtained.

The only remaining question then is, were Henicke and Schoeniger such agents of the defendant as to make the service on them effectual to bring the defendant into court?

As already stated they were the defendant's agents with whom the plaintiff dealt in regard to the subject matter of this suit. They issued the policy which formed the basis of complainant's claim, and have acted in the premises since the alleged liability is said to have accrued. If they were the agents of the defendant for the purpose of making this contract, it seems to me, they are sufficiently so to be served with process to enforce it.

The return in this case does not show affirmatively that the president of the corporation was not found in this district, and is therefore perhaps technically defective under some of the decisions in this state. I do not, however, understand that the defendant attaches any importance to this point, and, if they do, it can probably be avoided by the marshal taking leave to amend his return, as I presume it is not contended that service could have been made upon the president of the defendant company within this district.

SAMUEL L. CLEMENS vs. ALEXANDER BELFORD *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1883.

IN EQUITY.

1. AUTHOR'S RIGHTS—NOM DE PLUME—PUBLICATION WITHOUT COPYRIGHT—NO TRADE MARK IN AUTHOR'S ASSUMED NAME.—An author or writer cannot acquire any better or higher right in a *nom de plume*, or assumed name, than he has in his Christian or baptismal name, and he cannot have a trade mark in his *nom de plume*, so as to prevent the application of the rule that the publication of a literary product without copyright is a dedication to the public after which anyone may republish it, and in connection with the author's name.

2. AUTHOR'S NOM DE PLUME CANNOT BE SIGNED TO MATTER WHICH HE DID NOT WRITE.—An author who is known to the public under a *nom de plume* has the right to prevent the publication of matter which he did not write, in connection with his *nom de plume* and purporting to be written by him.

3. RIGHT TO PUBLISH UNCOPYRIGHTED PRODUCTION.—Any person can publish any uncopyrighted production, and give the author's name on the title page or elsewhere as he chooses.

4. The *nom de plume* "Mark Twain" is not a trade mark.

The bill in this case states that complainant had for about twenty years last past, been an author and writer by profession; that he has been in the habit for said time of publishing articles, sketches, books and other literary matter, composed by him for publication under the name assumed by him to designate himself as the author and writer of such sketches, articles, books and other literary matter of "Mark Twain;" that the said designation of "Mark Twain" has been used by him during the last twenty years as his *nom de plume* or trade mark as an author; that his said writings,

under the designation of "Mark Twain," have acquired great popularity and have met with a ready and continuous sale, and that no other person has been licensed, or permitted by him to use said designation of "Mark Twain" as a *nom de plume*, or designation of authorship; that the exclusive right of selecting for publication and of publishing in any collective form the sketches, articles or other writings, written and originally published by him, under the said name of "Mark Twain," so as to make a book or collection of durable form for publication by right ought to belong exclusively to him, and is of great value to him in his reputation, and a great security to the public as purchasers of the works purporting to have been written by complainant; that the said defendants have made, printed, put out and sold, in great quantities, a certain book, called upon its title page, "Sketches by Mark Twain. Now first published in complete form. Belford, Clark & Co., 1880." containing about 369 pages, many or most of which, in one form or another, are substantially like sketches published prior to the year 1880 by complainant; and that said Belford, Clark & Co. had no authority, leave or license from complainant, or derived from him, to make publication of the said book, or any part thereof.

That the defendants in their said book, so published by them, placed upon the page next succeeding the leaf whereon the title page is printed, a preface in these words:

"I have scattered through this volume a mass of matter which has never been in print before (such as 'Learned Fables for Good Old Boys and Girls,' the 'Jumping Frog Restored to the English Tongue after Martyrdom in the French,' the 'Membranous Croup' sketch and many others which I need not specify;) not doing this in order to make an advertisement of it, but because these things seemed instructive. "MARK TWAIN."

That complainant never gave any authority, leave or license to the defendants to print or publish any such preface, or any of the representations therein contained, or substantially the same; that complainant has by the said wrongful acts of the defendants been greatly injured, and his property in the said *nom de plume*, or trade mark, of "Mark Twain" as a commercial designation of authorship has been deteriorated and lessened in value; wherefore he prays damages and profits and a writ of injunction restraining the further publication of said work, and that the plates of such book may be damasked and destroyed.

To this bill defendants filed a special and general demurrer.

Thomas W. Clark, for complainant.

Hutchinson & Partridge, for defendants.

BLODGETT, J.—The position assumed by the complainant in this bill is, that he has the exclusive right to the use of the *nom de plume*, or trade mark, of "Mark Twain," assumed by him, and that defendants can be enjoined by a court of equity from using such name without the complainant's consent or license.

It does not seem to me that an author or writer has or can acquire any better or higher right in a *nom de plume*, or assumed name, than he has in his Christian or baptismal name. When a person enters the field of authorship, he can secure to himself the exclusive right to his writings by a copyright under the laws of the United States. If he publishes anything of which he is the author or compiler, either under his own proper name or an assumed name, without protecting it by copyright, it becomes public property, and any person who chooses to do so, has the right to republish it, and to state the name of the author in such form in the

book, either upon the title page or otherwise, as to show who was the writer or author thereof.

"In this country an author has no exclusive property in his published works except when he has secured and protected it by compliance with the copyright laws of the United States." *Wheaton et al. vs. Peters et al.*, 8 Peters, 591; *Clayton vs. Stone*, 2 Paine, 382; *Bartlett vs. Crittenden*, 5 McLean, 32; *Pulte vs. Derby*, 5 McLean, 328.

If an author would secure to himself the sole right of printing, publishing and selling his literary compositions he must do so under the copyright laws. *Stowe vs. Thomas*, 2 Wall. Jr. 547.

The seventh paragraph of the bill charges that many or most of the sketches contained in the book complained of, "in one form or another are substantially like sketches published prior to the year 1880 by your orator;" but it does not aver that they are, or ever were, protected by copyright, and by implication concedes their publication without copyright. If they were published without such protection, they became public property, and may be republished by any one who chooses to do so.

Undoubtedly an author has the right to restrain the publication of any of his literary work which he has never published or given to the public. *Little vs. Hall*, 18 Howard, 165; *Keene vs. Wheatly*, 9 Am. Law Reg. 33; *Bartlett vs. Crittenden*, 5 McLean, 32.

So, too, an author of acquired reputation and, perhaps, a person who has not obtained any standing before the public as a writer, may restrain another from the publication of literary matter purporting to have been written by him, but which, in fact, was never so written. In other words, no person has the right to hold another out to the world as the author of literary matter which he never wrote; and the same rule would undoubtedly apply in favor of a person

known to the public under a *nom de plume*, because no one has the right, either expressly or by implication, falsely or untruly, to charge another with the composition or authorship of a literary production which he did not write. Any other rule would permit writers of inferior merit to put their compositions before the public under the names of writers of high standing and authority, thereby perpetrating a fraud not only on the writer whose name is used, but also on the public.

The complainant, however, does not charge in this bill that the book in question, either by the title, preface or any other matter contained in it, attributes to him the authorship of anything which he in fact did not write.

The bill rests, then, upon the single proposition, Is the complainant entitled to invoke the aid of this court to prevent the defendants from using the complainant's assumed name of "Mark Twain" in connection with the publication of sketches and writings which complainant has heretofore published under that name, and which have not been copyrighted by him?

That he could not have done this if these sketches had been published under complainant's proper name is clear from the authorities I have cited, but the complainant seems to assume that he has acquired a right to the protection of his writings under his assumed name as a trade name or trade mark. This is the first attempt which has ever come under my notice, to protect a writer's exclusive right to literary property under the law applicable to trade marks.

Literary property is the right which the author or publisher of a literary work has to prevent its multiplication by copies or duplication, and is from its very nature an incorporeal right. William Cobbett could have no greater right to protect a literary production, which he gave to the world under the fictitious name of "Peter Porcupine" than

that which was published under his own proper name. The invention of a *nom de plume* gives the writer no increase of right over another who uses his own name. Trade marks are the means by which the manufacturers of vendible merchandise designate or state to the public the quality of such goods, and the fact that they are the manufacturers of them. And one person may have several trade marks designating different kinds of goods or different qualities of the same kind; but an author cannot, by the adoption of a *nom de plume*, be allowed to defeat the well settled rules of the common law in force in this country, that the "publication of a literary work without copyright is a dedication to the public, after which any one may republish it." No pseudonym, however ingenious, novel, or quaint, can give an author any more rights than he would have under his own name. The policy of the law in this country has been settled too long to be now considered doubtful, that the publication of literary matter without protection by copyright, has dedicated such matter to the public, and the public are entitled to use it in such form as they may thereafter choose, and to quote, compile or publish it as the writing of its author: That is, any person who chooses to do so, can republish any uncopyrighted literary production, and give the name of the author either upon the title page or otherwise, as best suits the interest or taste of the person so republishing.

Complainant does not say by his bill that the preface to the book in question was not written by him, and that by the publication of this preface in connection with the sketches, defendants have attributed to him the authorship of something which he never wrote; if he had so charged, perhaps he would have made a case entitling him to some relief.

The demurrer is sustained.

JOHN IRELAND vs. MICHAEL J. GERAGHTY *et al.*—ORIGINAL BILL.

PETER GERAGHTY vs. JOHN IRELAND *et al.*—CROSS-BILL.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1883.

IN EQUITY.

1. TRUSTS—SUBSEQUENT DESIGNATION OF, VALID.—If a conveyance is made to a trustee upon trusts thereafter to be declared or designated by the grantor, and the trustee accepts the designation so made by the grantor, the trustee is bound by such declaration and designation as completely as if the deed and declaration of trust were simultaneous and part of one and the same transaction.

2. CONVEYANCE BY PARENTS TO BABE—DELIVERY—VALIDITY.—If the parents of a child four months old, make a deed conveying to the child certain property, though it may be impossible to make an actual delivery to the infant, yet the grantors in order to make the deed valid must in some way manifest an intention to deliver it and make it effective; and where such a deed was never recorded or published, or ever afterward alluded to by either of the parents as a consummated transaction, but was found after their death among the papers of the father, it was *held* that the deed was inoperative to pass title.

3. SUFFICIENCY OF DECLARATION OF TRUST.—A trust is definite enough to be valid if there is sufficient certainty in the terms of the declaration of trust to enable a court of equity (in case the trustee should neglect or refuse to execute the trust,) to take possession of the trust through its own trustee or receiver, and execute the trust, and carry out the wishes and intentions of the donor.

4. A trust "for the purpose of providing an agricultural home for poor boys, in connection with an industrial school," is sufficiently definite to be valid.

5. CREATION OF TRUST—WHEN CONVEYANCE COMPLETED—RE-DELIVERY OF SECURITIES.—Where the grantor in a deed of trust delivered to the trustee all his credits and personal securities so indorsed and transfer-

red as to enable the latter to exercise absolute control and ownership over them, the fact that such securities were subsequently returned to the grantor at his request, and that he retained possession of them until his death, attending to the business connected with them, but not claiming ownership over them, would not operate to deprive the original trust conveyance of its validity, even though the deed of trust was not recorded during the lifetime of the grantor.

Hoyne, Horton & Hoyne, and *Jewett & Norton,* for John Ireland.

W. W. Farwell and *Robert Hervey,* for the other parties.

BLODGETT, J.—The original bill in this case is filed by complainant to obtain a judicial construction of the trusts under which complainant claims to hold certain real and personal estate, conveyed to him in his lifetime by Michael R. Keegan, now deceased, and the cross-bill is filed by Peter Geraghty, who claims said property as the sole heir-at-law of Mary Gertrude Keegan, the only child of said Michael R. Keegan, and seeks to have the alleged trusts declared void and set aside and the property in question awarded to the complainant in the cross-bill.

The material facts in the case as they appear from the record, are briefly these: Michael R. Keegan, who had been a resident of the city of Chicago for ten or twelve years, died in said city on November 15, 1879, leaving no widow and but one child, Mary Gertrude Keegan, and she died on the 26th of December, 1879, aged a little over four years, leaving as her next of kin, and sole heir-at-law, the complainant in the cross-bill, who is her maternal grandfather.

In the month of August, 1874, Keegan married Bidelia M. Geraghty, the mother of the child, Mary Gertrude, and the wife died in the latter days of July, 1879. For some time prior to his death, Keegan had expressed the intention of leaving his property in the hands of the Right

Reverend John Ireland, then and now coadjutor Catholic bishop of the diocese of Minnesota, in some form of trust for the benefit of this child, Mary Gertrude, and in the event of her death, for some charity; and on or about the 1st day of January, 1879, he forwarded to Bishop Ireland a tin box, containing all, or nearly all, the notes, bonds and other securities for the payment of money, which he, Keegan, then held; and on the 4th day of February, 1879, Keegan executed an unconditional deed in fee simple to Bishop Ireland, conveying to him all the real estate he, Keegan, then owned. No consideration was paid by Bishop Ireland for this conveyance, and there is no doubt, from the proof, that this conveyance was made upon such trusts as Keegan should direct or create—that is, it was not a gift to the Bishop individually, but a conveyance to him in trust for such purposes as the grantor in the deed should appoint.

At about the same time, perhaps simultaneously with the execution of this deed, but possibly some months later, and on or about the 18th of April, 1879, Keegan executed and delivered to Bishop Ireland a paper writing, in the following words:

"To the Right Reverend John Ireland, Coadjutor Bishop of St. Paul, Minnesota:

"Right Reverend Sir—The real and personal property which I have heretofore, and may hereafter convey to you, are for the benefit of my infant child, Mary Gertrude Keegan, born November 15, A. D., 1875, to be delivered to her, with its accrued profits, rents and interest, when she shall become of age. Should she die before coming of age and leave no issue, then to yourself, for the purpose of providing an agricultural home for poor boys in connection with an industrial school.

"Witness my hand and seal, this fourth day of February, A. D., 1879.

(Signed,) "MICHAEL KEEGAN." [Seal.]

And underneath this instrument is written an acceptance by Bishop Ireland of the following tenor:

"I hereby accept the above trusts for the purposes above specified.

(Signed.) "JOHN IRELAND."

Upon the back of this instrument is written the following letter from Keegan to Bishop Ireland:

"Right Rev. John Ireland, D. D., Coadjutor Bishop of St. Paul, Minnesota:

"Rt. Rev. Sir:—To what is written on the other side, I add further that if my child should refuse to comply with your orders and wishes and go from under your control, then while she so remains she is not to receive a dollar from you, either toward her support or education (but in case of her sickness, do as your heart suggests.) If she should become a religious, which God grant, before becoming of age, place $10,000 at her disposal when fully professed, and the balance when she is twenty-one years old. Should she marry before coming of age, she can have $5,000 on her marriage to be placed at interest, and have the yearly interest of it until she is of age; the yearly interest or rent is to be put in staple coupon stocks, and as it falls due, but ten per cent. of the interest or rent is to be regularly deducted from the income and devoted to such charities as your lordship thinks proper; but one-third of this ten per cent. is to be given for masses for my soul in union with the souls in purgatory, and the masses are to be said by priests in poor missions or who need a little help. Regarding my wife I will hereafter make a separate statement which must be satisfactory to your approval; but if I should die suddenly then let her have a decent support while she remains unmarried.

"These conditions are to apply to my property in your hands at the time and after my death.

"I remain, my lord, most respectfully,

"Your most obedient servant,

"MICHAEL R. KEEGAN."

The proof shows that the deed to Bishop Ireland, and the declaration of the trusts upon which the deed was made, and the personal property delivered to him, were both prepared at the same time by the same attorney, and after consultation between Keegan and his attorney as to the best mode of creating the trust, so as to probably cause the least trouble to the Bishop, and if possible to avoid litigation with any prospect of success; and whether the declaration, or statement of the trusts was signed and delivered simultaneously with the deed, or at a subsequent date, in my estimation, is of but little consequence. It may be, as I have already suggested, that the

statement of the trusts was not signed and delivered to the Bishop until the Bishop was in Chicago, some time in the month of April, and possibly the letter upon the back of the declaration of the trusts was written thereon at or before the time it was delivered to the Bishop. This, however, seems to me to be of little consequence, as there can be no doubt of the proposition that, if a conveyance is made to a trustee upon trusts thereafter to be declared or designated by the grantor, and the trustee accepts the designation so made by the grantor, the trustee is bound by such declaration and designation as completely as if the deed and declaration of trust were simultaneous and part of one and the same transaction. There can be no doubt of the fact that by the conveyance of the property in question to the Bishop, he became a trustee, and until the objects of the trusts were designated, he was a mere naked trustee, but as soon as the grantor had in writing indicated the uses to which the property was to be applied, and the trustee had accepted the terms of the trust so indicated, the transaction was complete so that even if we assume or admit that the letter on the back of the declaration of trust was written there before the delivery of the instrument and the acceptance of the trusts, then the written declaration of trust, dated February 4th, must, undoubtedly be considered as modified by the letter of April 18th, but the modifications so made are of no importance at this time, as they only related to the management of the estate during the life and minority of the child, and during the life of the wife after her husband's death and while she remained a widow. If this child or the widow of Keegan were yet alive, important questions might arise as to the support of the child during her minority and the support of the widow, but the particulars in which the letter modifies the declaration of trust in no way affect the question as to

the disposition to be made of the estate in case of the death of the child without issue.

The child, Mary Gertrude Keegan, was born November 15, 1875, and on the 7th day of February, 1876, when the child was but little more than four months old, a deed in fee simple was made by Keegan and his wife, conveying to this child two lots then owned by Keegan, described as No. 425 May street, and No. 457 West Twelfth street, in this city, and being part of the property conveyed to Bishop Ireland by the deed of February 4, 1879. At the time this deed was executed and acknowledged, Keegan remarked to the notary, pointing to the child, who was held in her mother's arms, "she is early in acquiring property," and he handed the deed toward the child, but did not give it into her hands, but kept it himself. This deed was never recorded and was found among Keegan's papers after his death.

The questions raised upon these leading facts, are these:

First—Geraghty, the cross-complainant, insists that the deed from Keegan and wife to the infant child, made in February, 1876, is an operative conveyance, and vested the fee simple to the lands therein described, in the child, and that he, as the sole heir-at-law of the child, is entitled to hold the property, and to have the conveyance from Keegan to Bishop Ireland set aside as a cloud upon his title to the property covered by the deed to the child.

Second—That the conveyance of the real and personal property to Bishop Ireland was obtained by reason of the undue influence of Bishop Ireland upon the mind of Keegan.

Third—That the object of the trust in Bishop Ireland is left so obscure, uncertain and ill-defined, as to render such trust void and inoperative, and make it impossible to uphold or execute it as a trust to a charitable use.

Fourth—It is insisted that the trust was never so far completed as to make it a valid trust in Bishop Ireland, for the

purposes designated in the declaration of trust of February 4, 1879.

As to the deed from Keegan and wife to the child, the only question is whether it can be treated as ever having become an operative deed. It never was delivered to the grantee, and considering the immature age of the grantee, it was, perhaps, impossible to have made such a delivery, and unnecessary that it should have been so made; but there is no doubt that the grantor in such a deed should do some act manifesting an intention to deliver the deed and make it effective. The testimony does not disclose the motives which led these parents, so soon after the birth of this child, to unite in a conveyance of this character. We only know from the proof that such a paper was signed and acknowledged by them. It was never recorded nor published, or in any way, by either of the parents, ever afterward alluded to in any such way as to show that they, or either of them, considered it a consummated transaction. Whether the deed was made at the instance or request of the mother, and to please her, or whether it was a part of some inchoate plan or purpose of one or both of these parents, which was subsequently abandoned, we do not know. We do know this, however, that Keegan was a man of affairs, well acquainted with the forms of procedure requisite to make a valid conveyance of real estate; that he prepared most of his own deeds and business papers; and this fact, coupled with his retention of the deed, without recording it, is quite conclusive evidence to my mind that he never intended it to become operative, especially when you supplement this fact with the manner in which he subsequently dealt with this property, and the disposition which he subsequently made of all his property for the benefit of this child. I therefore feel impelled to the conclusion, from the testimony in this case, that this deed was never delivered, and has never become an operative grant to

this child; and, therefore, that no title to the lands mentioned in this deed was cast upon the cross-complainant, Peter Geraghty, by descent, as the sole heir-at-law of the child.

As to the allegations of undue influence, I can find no evidence in the record that Bishop Ireland ever exerted, or attempted to exert, any influence to induce Mr. Keegan to convey his property to him, or make him a trustee. On the contrary, whatever evidence there is bearing upon that question tends to show that Bishop Ireland accepted this trust reluctantly, and only out of consideration for his long friendship towards Mr. Keegan, and at Mr. Keegan's earnest and pressing instance and request. That Keegan was an earnest and zealous Catholic, and that his relations to Bishop Ireland for many years had been especially friendly and confidential, are facts amply shown from the proofs in the case; but it nowhere appears that the Bishop advised this disposition of Keegan's property, or sought the office of trustee.

As to the objection to the validity of the trust upon the ground that it is not so sufficiently defined that it can be executed with certainty, it seems to me very clear that Keegan's first and leading purpose was to make provision for his child. He had, by his industry and close economy, accumulated quite an estate for a man in his position in life, valued, as he deemed it, about the time this transaction took place, at from $75,000 to $80,000. He had unfortunate differences with his wife. He felt that his health was rapidly declining, and was anxious to make some sure disposition of the property by which it could be preserved for the benefit of his child; this seems to have been his first and controlling thought. Running throughout the whole web of this record is the constant expression of his anxiety to secure his property for the benefit of this child. At times, he seems to have made some provision for his wife, but the papers making

such provision were destroyed, and whatever arrangement of that kind was contemplated, was never completed, so that finally, when, after consultation with his attorney, he came to a definite conclusion, it was to convey all his real and personal property to the Bishop, in trust for the child, and the document which, undoubtedly, was intended to define that trust clearly, as the guide for the trustee in the subsequent disposition of the estate, was the paper prepared simultaneously with the deed by the attorney and dated February 4, 1879. The subsequent letter of April 18th, indorsed upon the back of this paper, may be taken, in some respects, to be a letter of more minute direction as to the manner in which the Bishop was to execute the trust, for the benefit of the child, and, in a certain contingency, for his wife. He goes more into the details of how he would have the trust executed; what should be done with the estate in the event of the death of the child, was a matter which he seems to have fully settled from the time the declaration of trust was signed, and is nowhere changed, nor any intent to change it manifested; what he directed was that in the event of the death of the child, leaving no issue, the property was to be held by Bishop Ireland, "for the purpose of providing an agricultural home for poor boys, in connection with an industrial school." This seems to me as definite as most donors, contemplating the founding of a charity, would consider necessary; and as definite and explicit as is necessary to point out the charitable use to which the property is to be applied by the trustee. It seems to me that a fair test as to whether this trust is stated with sufficient certainty or not, would be to inquire whether, if Bishop Ireland should neglect or refuse to execute this trust, in accordance with the directions of the grantor, there is sufficient certainty in the terms of the declaration of trust to enable a court of equity to take possession of the trust through its own trustee, or receiver, and

execute the trust, and carry out the wishes and intentions of the donor. The direction is to provide an agricultural home for poor boys. It seems to me that such a direction would be clearly understood by any court of equity having jurisdiction of such matters; that such court could, without difficulty, see to it that the trustee which it should appoint should carry out the purpose thus clearly manifested. I am, therefore, of opinion that this trust cannot be defeated by reason of any uncertainty as to its object, or the purposes of the donor.

But it is urged that this trust never became fully created, because the deed to Bishop Ireland was not recorded during Keegan's life, and very shortly after the securities were forwarded to the Bishop, he returned a portion of them to Keegan who collected and reinvested and expended a portion of them in the exercise of his own judgment and to some extent in accordance with the arrangements he had previously made; and that shortly after the death of Mrs. Keegan, Bishop Ireland returned to Keegan, at his request, in Chicago, the box of securities, and that Keegan retained possession of those securities from that time until his death, thereby depriving the transaction of the character of a *donatio inter vivos* or a completed gift, during the life of the donor.

The proof shows that at the time these securities were sent to Bishop Ireland, they were all so indorsed and transferred as to enable him, if he had chosen to do so, to exercise absolute control and ownership over them. Some of these securities, however, as the proof shows, were in such a condition that they needed constant attention. Bishop Ireland had reluctantly accepted the sole trust and care of these securities, and undoubtedly expected that during the life of Keegan he would have the benefit of Keegan's experience and ability in caring for, reinvesting, and otherwise looking after the property. It is hardly to be supposed, from what the testi-

mony discloses in regard to this matter, that Keegan with his habits and his methods of business expected or intended to lose all interest in the property the moment he had made such change as to vest the legal title in Bishop Ireland, his trustee. His affection for his child, which seems to have continued warm and active to the last, would alone have prompted him to take a continued interest in the management of his estate. It is therefore only natural, it seems to me, that he should have continued to exercise such supervision over and interest in the property as he thought would best secure its preservation and further accumulation. The proof discloses the fact that for some real or imaginary reason, Keegan, in the latter part of the year 1878 or fore part of the year 1879, was fearful that his wife and some friends of hers would take measures to deprive him of the control of his property—to bring a charge of insanity, or incompetency to manage his property before some of the courts in Chicago, so as to secure the appointment of a conservator, or put his property into the hands of some other person to manage. He, therefore, somewhat hurriedly, in view of such a contingency, sent the personal estate to the Bishop at St. Paul, perhaps earlier than he intended, but when any of the papers were returned to him he assumed always to be acting in whatever he did about it, in the interest and as the agent of Bishop Ireland; stated frankly to his acquaintances that the property belonged to Bishop Ireland, and he did not claim to be the absolute owner of it. It is also true that Bishop Ireland sometimes in his communications to Keegan in reference to investments to be made from the estate, treated Keegan as having some control or management of the property, or as being entitled to be consulted or to have the management of it, but this does not militate against the relation of trust which the bishop had assumed nor, it seems to me, can it be held to defeat the Bishop's title.

Much stress is laid upon the fact as disclosed in the testimony of Mr. Comisky, one of the witnesses, that the morning after the death of his wife, Keegan informed him of the fact of Mrs. Keegan's death, and in the same connection said he was going now to send to the bishop for his box; but in the light of the relations which had existed for some months previously between Keegan and his wife, and the fears which he had expressed of her initiating steps to deprive him of the control of his estate, it is very likely that he did not dare to ask that the securities be returned to him, even that he might perform some necessary work in regard to them while his wife was living, for fear of such proceedings, and that as soon as she was dead he felt relieved in that regard and at liberty to do in reference to the property, whatever he felt, as a business man, was necessary to be done in order to properly conserve and care for it. Undoubtedly the almost positive refusal and objections of Bishop Ireland to take upon himself the responsibility of this trust, had the effect to induce Keegan to either expressly or impliedly promise that the Bishop should be relieved of all trouble in regard to the estate so long as he, Keegan, was able to attend to it. This is natural and probable. It is not likely from the proof that Keegan felt any special sorrow or grief over the death of his wife, and such was the organization of the man's mind that he perhaps felt a sense of relief when he knew that she could no longer annoy him, or interfere with his plans. These arrangements in regard to the property for the primary benefit of his child and the provision as to its future disposition in case of the death of the child would and could no longer be thwarted and embarrassed by the interposition of his wife, and he therefore felt free to aid the Bishop by such attention as he could give the property. The proof is ample throughout the record, that after the securities were returned to Keegan, he industriously, and as far as his health would permit,

continuously applied himself to the arrangement and attention which the business connected with the securities, demanded, but in all his dealings he constantly stated that what he was doing was for the Bishop, and more fully to consummate the arrangement he had made for giving the Bishop complete control of his estate. In April, 1879, he told John Adams, an intelligent business man in this city, that he had "fixed everything relating to his affairs; that he left everything to his child, and in case of her death, the whole property was to go to Bishop Ireland to build an institution for destitute boys in the Diocese of Minnesota." * * * "The term he used was 'Agricultural College for Destitute Boys.'" So, too, just before he was stricken down with his last illness, he told his house-keeper that in the event of his sudden death, the tin box containing his securities was to be sent to Bishop Ireland, and during his illness his frequently expressed wish and direction was that the securities should be at once placed in the hands of Bishop Ireland. At this time he had no fear of family complications. His wife was dead, no relative of hers, no relative of his own, no person was seeking to control, or interfere with the control of this property, so as to make him anxious to evade any judicial, or other proceedings, because none were threatened or impending.

It seems, therefore, very clear to me, from the proof, that whatever was done by Keegan after the delivery of the securities to Bishop Ireland, was done in consummation and furtherance of the trust which he had created, instead of being intended to operate against or defeat it; and that nothing was done indicating an intention on the part of the donor or his trustee to cancel or abandon the trust. The child was living when Keegan died, and I have no doubt he remained entirely satisfied with the disposition he had made of his estate. The will that he made during his nearly last rational moments, does not, to my mind, seem intended to cancel or set

aside this trust. The main purpose of the will appears to me to have been to appoint the Bishop the guardian of the child. Making her his sole devisee would only operate to vest in her any property he owned which he had not conveyed to the bishop, but it could not divest the Bishop of any title he had already obtained, and in regard to which the trust had been declared in writing.

I therefore come to the conclusion that the estate in the hands and control of the administrator appointed by the Probate Court of Cook county should be delivered to Bishop Ireland; that the cross-bill of Peter Geraghty should be dismissed for want of equity, and that Bishop Ireland should be left, so far as this court is concerned, to execute the trusts created by the conveyance, and directions to him of the donor. As it is manifest from the entire tenor of the transaction that it was intended that Bishop Ireland should expend these trust funds in the Diocese of Minnesota, it may hereafter devolve upon the courts of that state to see to it that this trust is faithfully administered, according to the terms upon which the trust was created and accepted.

THE LOUIE DOLE.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1883.

1. ABANDONMENT OF VERBAL CHARTER—RIGHTS OF PARTIES—WAGES.—A verbal contract of charter of a tug boat for the season may be abandoned by the parties thereto after the tug has been operated some time under such charter, and the party operating it be allowed wages for that time, and if the interests of third parties have not intervened, such wages would be a lien on the tug.

2. LIEN FOR WAGES NOT WAIVED BY PRESENTING CLAIM IN BANKRUPTCY AGAINST OWNER.—A seaman by presenting his claim for wages against the owner of a vessel in bankruptcy does not waive his maritime lien on vessel.

3. LIBEL FOR WAGES—STALE CLAIM.—The failure to file a libel for wages for more than a year after the service ended and more than two years from the time it commenced, during all of which time the tug was in port subject to seizure, *held*, under the circumstances, not to render the claim stale.

Appeal from District Court.

J. S. Reynolds and *Magee & Adkinson*, for libellant.

C. E. Kremer, for respondent.

DRUMMOND, J.—The libel in this case was filed on the 6th day of May, 1878, against the steam tug boat, "Louie Dole" to recover compensation for services rendered by the libellant on board of the tug from April 6 to July 4, 1876, as engineer; from July 21 to November 11 of the same year as wheelsman and pilot; and also for services rendered in March, 1877, on board of the tug as engineer in fitting her out. On the seizure of the tug upon a monition issued, it was released,

and a claim, as owners, was put in by Frederick Medynski and William G. Drinkwater. A decree was given in favor of the libellant by the District Court, but holding that the 5-16ths interest of Drinkwater was not liable for the amount of the decree, from which one of the claimants, Medynski, has appealed.

The facts, as shown by the proofs, seem to be substantially as follows: at the time of the performance of the services mentioned, Jesse Cox was the managing owner of the tug, and a contract of service was made between him and the libellant by which for the first period named, the libellant, as engineer, was to have $110 a month; for the second period named, as wheelsman and pilot, $145 a month, and for the last period $31.77; the whole balance, claimed to be due at the time the libel was filed, being $406.01.

It was not controverted that the services were performed by the libellant as stated, and the evidence clearly shows that the compensation named was agreed to. In March, 1877, Medynski purchased 5-16ths interest in the tug, and in April, 1878, the other 11-16ths; the other claimant purchased the interest which he had from Medynski. In July, 1876, a verbal agreement of charter was made between Cox, and libellant, and a man by the name of Kibbe, by which the libellant and Kibbe were to run the tug for $5 a day to be paid for her use. It was understood at the time that a written contract of charter should be made which, however, was never drawn up. The contract seems not to have resulted very profitably for the parties to it, because when it came to be terminated it was ascertained there were several unpaid bills against the tug, and as a result of this, it was agreed between the parties, and particularly between Cox and the libellant, that the contract of charter should be considered as abandoned, and that for the services rendered by the libellant during the running of the charter, which was only a few

months, compensation should be given as wages, the libellant never having received any portion of the profits, if any were made, during the time of the charter.

The defendants claim, under this state of facts, that the claim of the libellant was stale, because the libel was not filed until May, 1878, more than two years from the time that the service commenced; and because for a portion of the time when the service was rendered, it was under the charter which has been already referred to; and it is claimed by the defendants that they had no notice of the account of the libellant against the vessel at the time they made the purchase, and that during all the time from the spring of 1876 until the spring of 1878, the tug was here in the port of Chicago, subject to seizure at any time, if a maritime lien existed against her on the part of the libellant. It is admitted by the defendants that there was a small balance due the libellant for the services performed in fitting out the tug in March, 1877, which, it is alleged, has been tendered to the libellant.

The books of account, which were kept by Koehler, one of the witnesses, and in which the entries were made, crediting libellant with the services performed, and with the money that was paid to him from time to time, do not appear to be in the record in this court, though referred to by some of the witnesses, but it is a fair inference, from the statements made by several of the witnesses, that the account was a continuous account. The libellant seems to have thought that there was a distinction in the kind of service that he performed constituting a lien against the tug, and that the service as engineer was superior to that which he rendered in other capacities; but under the circumstances of the case, there does not seem to be any just distinction, existing in the law, as to the service performed; and the fair mode of appropriating the payments which were from time to time made

to the libellant would be to the oldest service performed, unless there was an agreement between the parties as to the appropriation, which does not seem to have been the case. Then, the balance which was claimed to be due by the libellant, in that view of the case, might be considered as accruing from the service most recently performed. There can be no doubt but that in July, 1876, a contract of charter was duly made, although not in writing, between the managing owner and the libellant, and that the tug was run under that contract during a portion of the season of 1876; but it is equally certain, there having been no writing upon the subject, that it was competent for the parties to treat this contract of charter as having been abandoned, and to replace or rehabilitate the libellant in the position which he occupied prior to the existence of the charter, provided the rights of third parties were not affected by the arrangement made. The evidence clearly shows that this was all done prior to any interest acquired by the defendants in the tug, and so they would have no right to complain of the arrangement made, and I cannot doubt but that it was competent for the parties in interest, by mutual consent, to restore themselves to the position which they respectively occupied prior to the contract of charter.

There remains the question whether the claim of the libellant was so far stale as to prevent the lien from operating upon the tug. The libellant has stated the reason why the claim was not put in litigation sooner. It was, because, as he alleges, Cox, the owner, had repeatedly promised to pay the claim and because he had gone into bankruptcy, and the libellant was informed that that fact affected the validity of his claim. The bankrupt scheduled the claim, as a personal demand against himself, which it no doubt was, as the owner and captain of the tug; but, clearly, that could not prejudice the right of the libellant to enforce his claim by any proper

proceeding. He did not, thereby, waive his lien, if any existed, and the manner in which the libellant presented his claim to the bankrupt court, could hardly be considered, of itself, as a waiver of the lien.

Medynski admits that when he purchased 5-16ths of the tug, in the spring of 1877, Cox told him that there were some bills against her, although there was enough due outstanding to pay all, but he denies that Cox mentioned that there was any bill due to Carter. There is a good deal of conflict in the evidence upon this subject, but the fair inference is, that information sufficient was communicated to Medynski in the spring of 1877, before or at the time of his purchase, and certainly in the summer of that year, to put him upon full and rigid inquiry as to any liens which might exist against the tug. One of the witnesses refers to a conversation which took place between Carter and Medynski in the latter part of April, 1877, where Carter's claim was particularly referred to, and in which Medynski assured him that he need have no anxiety about the payment of his claim. And Koehler states he told Medynski of Carter's claim before he purchased. But, suppose there be doubt upon this point, then would the fact that no proceedings were instituted by the libellant against the boat during the season of 1877, and not until May 8, 1878, waive or destroy the lien which originally existed? I do not think it would. In March, 1877, Medynski purchased 5-16ths of the tug; he did not purchase the remaining 11-16ths until April, 1878, and such delay as this has never been considered as depriving a person, who had rendered service on board of a vessel, of the lien which the maritime law gives him.

The decree of the District Court will, therefore, be affirmed.

CITY OF CHICAGO vs. B. P. HUTCHINSON *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1883.

1. REMOVAL OF CAUSES—CONDEMNATION PROCEEDINGS—ONE DEFENDANT MAY REMOVE.—Where a number of persons, land and lot owners, are united as parties defendant to a petition by a city for condemnation of their lands and lots for the opening of a street, there is such a controversy between any one of the defendants and the city as will allow a removal by him of his branch of the cause from the State to the Federal Court, if the requisite citizenship exists.

2. ENTIRE SUIT NOT REMOVED.—But in such case the removal extends only to the particular controversy in the case, existing between the city and the defendant petitioning for removal, and does not take with it into the Federal Court, the entire cause.

3. APT TIME FOR REMOVAL—PETITION BY "UNKNOWN" DEFENDANT.—If a person who is made a defendant to a suit as an "unknown" owner, is, before the trial of the case on his application to the court, made a party defendant by name, he may then file a petition for removal of the cause from the State to the Federal Court, although the term of the State Court at which the case could have been first tried has passed.

This was a petition by the city of Chicago for condemnation of certain lots for the opening of a street.

On application of Jane E. Martin, one of the defendants, for removal of the cause to the Federal Court.

Francis Adams, corporation counsel, *Jas. L. High* and *F. H. Winston, Jr.*, for plaintiff.

Edsall & Hawley, for Jane E. Martin.

DRUMMOND, J.—By an ordinance of the city council of Chicago, passed March 16, 1882, Dearborn street was directed to be opened from the south line of Jackson street to the

north line of Taylor street, to the width of 80 feet, and on the twenty-fourth of March, 1882, a petition was filed in the Superior Court of Cook county, by the city attorney, for the condemnation of the land and lots necessary to be taken in order to have the street opened as provided by the ordinance.

The petition required about 200 lots, or parts of lots, to be condemned, and comprehended, of course, a very large number of owners, about 40 of whom were named, the remainder being described as "unknown;" and in conformity with the statute provided in such cases, this fact was shown, and publication of the application was made, and all parties in interest required to come into court and be heard as to their claims. A summons issued to the persons named, returnable on the first Monday of May then next ensuing, and was returned served on many of them, who appeared in answer to the same.

It is claimed on the part of the city that by the service of the summons thus issued and served, and by the publication made in conformity with the statute as to unknown owners, all the defendants who were the owners of the property were in court and subject to its action at the June term, 1882. But nothing seems to have been done towards an immediate hearing of the case until the seventh day of December, 1882, when, on the application of the city attorney, the court ordered that "this cause be and the same is hereby set down for trial Monday next." On the second day of January, 1883, before the trial of the cause, Jane E. Martin, a citizen of Berrien county, in the state of Michigan, filed an affidavit, stating that she was the owner of part of one of the lots sought to be condemned, and prayed to be made a party to the suit, stating that she had no knowledge of the application until that time. With the consent of the city attorney, and by the order of the State Court, she was then made a party defendant. On the third day of January, she filed a petition

in the court for the removal of the cause to this court, under the act of Congress of 1875, and filed the requisite bond. On the 6th the court refused the application for the removal of the case, for the reason that the proceeding connected with the extension and opening of Dearborn street did not present, as to her, a controversy wholly between citizens of different states, and which could be fully determined as between them; and for the further reason that the application for removal came too late, as not being filed before or at the term at which the cause or proceeding could be first tried. Under these circumstances she asks leave to file a transcript of the case in this court and have it docketed. This application is opposed by the city because the case is not within the terms of the act of Congress authorizing the removal of cases from the State to the Federal Court.

The petitioner, in her application for the removal of the cause, stated that she was then, and had been for a time prior to the commencement of the proceedings in the State Court, continuously a citizen of the state of Michigan. She did not then state, nor does it appear, when she became the owner of the part of the lot which is sought to be condemned, further than at the time she applied to become a party defendant, she says, "that she is the owner of the south 24 7-10 feet of lot 16 of block 133 of school-section addition to Chicago." Her application was made to the court to become a party as one of the numerous defendants called "unknown" in the petition and other proceedings in the cause. The statute of the state under which the application was made by the city for the condemnation of the property, in this case, requires that a jury shall be impaneled to ascertain the compensation to be paid to the owners, and declares: "If any defendant or party in interest shall demand, or the court shall deem it proper, separate juries may be impaneled as to the compensation or damages to be paid to any one or more

of such defendants or parties in interest." In this case the ordinance directing the opening of the street provided that the cost thereof should be paid by special assessment levied upon the property benefited thereby, to the amount that the same might be legally assessed therefor, and that the remainder of the cost should be paid by general taxation. Chapter 24 of the Revised Statutes, Art. 9, section 133, and the following sections, declare how the special assessment shall be made under such circumstances, and how the money shall be raised and paid; and section 167 provides for a supplemental petition to be filed to assess the benefits to the owners by the proposed improvements in condemnation cases.

It will be seen, from the foregoing statement of facts, that there was but one petition filed by the city, which included a series of lots lying upon one street. It, of course, affected the interest of every separate owner of the property to be condemned, and, in one aspect of the case, the controversy which he might have with the city was one in which the other owners were not directly interested. The question as to him was what was the value of the property which was to be appropriated for the use of the street. At the same time, in another aspect of the case, it is said the proceedings were more or less united, and in making the special assessments which might be necessary to pay in part for the opening of the street, the interests of adjoining lots were more or less connected together. It is in this view of the case that it is contended, on the part of the city, that this is not such a suit or such a controversy as is referred to in the second section of the act of 1875.

In *Boom Co. vs. Patterson*, 98 U. S. 403, the Supreme Court of the United States held, where an application was made by the company to condemn the land of Patterson for its uses under the law of Minnesota, that the case was subject to removal from the State to the Federal Court under the act of

1875. In that case, commissioners in the first instance appraised the value of the land, there being only one owner. Under the law the case then went to the District Court of the state, and the owner of the land, as a citizen of another state, made the application for removal, which was sustained by the Supreme Court of the United States. This case, of course, decides the general question in favor of the jurisdiction of the Federal Court on an application for removal in a condemnation proceeding; in other words, that it is the kind of controversy referred to in the act of 1875, which, under the circumstances therein named, will authorize the removal of the cause; and, if this case is in principle like that as to the subject-matter of the controversy, then it is, under that decision, removable. The language of the second section of that statute is "that one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit to the Circuit Court of the United States for the proper district." A condemnation proceeding, as such, is, under the decision just referred to, such a suit as can be removed. Is this such a suit?

We have seen that it is commenced by a petition of the city. The city, a corporation of Illinois, is the sole plaintiff and actor in the case. All the property-owners of different lots, or those interested therein, are defendants—expressly so called in the statute. A summons is to issue and be served upon them "as in cases in chancery." As to the unknown defendants, publication is to be made containing a notice of the pendency of the "proceeding," the parties thereto, and the title of the court; and then the statute declares that such notices so given by publication shall be sufficient to authorize the court to hear and determine the "suit." And upon the return of the summons, and at the time fixed by the court, a jury is to be impaneled as already stated. Now, the question is, whether, as this is an application for the con-

demnation of the property of different owners, it is a suit within the meaning of the act of Congress, and such as is removable, notwithstanding the interests of the respective owners named as defendants are all distinct as to the several parcels of land which they own. There can be no doubt it is a suit of some kind, known as such in law.

This being an application made by one of the numerous defendants, who, as known or unknown, were named in the summons, and some of whom afterwards appeared in the case by being made parties, the question arises whether, within the meaning of the second section of the act of 1875, there was a controversy which was wholly between the applicant and the city, which could be fully determined as between them. If that were so, then, within the express terms of the statute, she had the right to have the controversy and her suit removed. No question is made about her interest in the property. The only controversy between the city and herself is as to the value of the land, and it follows that it is a controversy wholly between them, and when the value of the land is ascertained by a jury, and then followed by proper action on the part of the court making the verdict of the jury effective, it has been fully determined as between them. It is difficult to imagine a case where different controversies may be brought into a cause and become the matter of judicial investigation and determination, where the interest which a particular person may have in one of the controversies is more clearly ascertained and separable than in this case.

But it is insisted on the part of the city, and such was the opinion of the State Court, that the application was made too late. Under the third section of the act of 1875 a petition for removal must be filed in the State Court before or at the term at which the case could be first tried, and before the trial thereof, and it is claimed that the cause could

have been tried as early as June, 1882, and it is not controverted but that there were several terms of the State Court intervening between the return of the summons and the time when the application was made for removal, although the case was not set down for hearing by the court until December, 1882. If she had been named as a defendant in the summons, and had been served with process, and brought into court the requisite time before the June term, then, perhaps, if she had not made her application at that term, it might, as to her, have been too late. But she never was in court in her own person until she voluntarily came by petition and asked to be made a defendant, on the second day of January. On the following day she filed her application for removal. She states, and no controversy is made upon that point, that she had no knowledge of the institution of the proceeding for condemnation until the time that she filed her petition to be made a party. If, therefore, she is precluded from exercising the right of removal under the facts stated, she is deprived of a right which was clearly intended to be conferred upon her by the act of 1875. If, while she was an unknown defendant, the cause had proceeded to trial before a jury to ascertain the compensation which should be paid to the respective owners, possibly it would have been too late. But it is not necessary in this case to decide that question, because the hearing had not commenced before the State Court when the application for removal was made; and the view taken by the Federal Courts has been that a party ought not to be deprived of the right given by the law before he has had an opportunity of the power of presenting his petition for removal; and it is clear, from the facts already stated, that she made her application with reasonable diligence as soon as she appeared in court.

In *Harter vs. Kernochan*, 103 U. S. 562, a decree had been rendered by the State Court against a party as an

unknown defendant under the statute of the state, who, exercising the right given by the law, came in and had the decree opened, which being done, he made an application for the removal of the cause to the Federal Court, and the Supreme Court of the United States decided on the ground that this was the first time he could apply for removal, that it was properly transferred to the Federal Court.

In *Wehl vs. Wald*, 17 Blatchf. 342, a suit was brought in September, 1878, in a State Court of New York, against the defendant. In April, 1879, the plaintiff amended his complaint and demanded judgment against another defendant not originally named in the case. This defendant put in an answer in May, 1879, and afterwards presented a petition to the State Court for the removal of the cause, and that was held no valid objection to the application.

In *Burdick vs. Peterson*, 2 McCrary, 135, an ejectment was brought in February, 1876, these being the only parties. The case was continued by the State Court at several terms, and in October, 1877, one Tollman intervened in the case by petition as the owner in fee-simple of the land in controversy, and was made defendant in place of the original defendant, and at the same time he filed a petition for the removal of the cause; and it was considered no valid objection, the application being made the first time that it could be made by him.

Undoubtedly this is a proceeding *in rem*, but one in which the owners of the *res* are interested and have the right to be heard, both as to the condemnation itself and as to the compensation which shall be paid if the land is condemned; and when the owner of the *res* appears in court, having been sued as a person unknown, then it becomes like other controversies between parties, the question being whether property can be taken for public use, and if so, for how much. And if when he thus appears in court, and at once

makes application for the removal of the suit under the act of Congress, the right to removal is denied, then he is deprived of the privilege which the law intended to confer on him.

I cannot doubt that under the facts and circumstances of this case the applicant had the right to remove the cause; and I therefore think the petition was filed in proper time, within the meaning of the third section of the act of 1875.

This case was afterwards further argued before Judges DRUMMOND and BLODGETT sitting together and the following opinion rendered:

DRUMMOND, J.—The point whether or not, under the ruling which the court made the other day, the transfer of the controversy between the city and Jane E. Martin would bring here all the other controversies between the city and the various defendants and owners of the different lots sought to be condemned, has been argued by the counsel of the respective parties, and that question is now to be decided. In the course of the argument, however, upon that question, the other points which were decided by the court were to some extent reargued, and it seems to be the desire of the counsel for the city that those points should be reconsidered by the court. They have been, and a consultation has taken place between the district judge and myself upon those two questions, and I may say that we neither of us have any doubt upon this point: that the application by Jane E. Martin for the removal of the cause was made in time. We think that under the rulings of the Supreme Court of the United States no other conclusion can be reached. She appeared before there was any trial or hearing of the cause, for the first time, having been before an unknown defendant. As soon as she appeared and was made a party, she made her application for

removal, and I can only repeat that to deprive her of the right of removal, provided it is a cause that can be removed, simply because she then for the first time made her application, would be in effect to render nugatory the provisions of the act of Congress, and subject it to the legislation of the states.

Upon the other point the same degree of confidence has not been felt, but our conclusion is the same as that announced last week; that this is a suit, as between the city and Jane E. Martin, which could be removed. The principal argument of the counsel of the city is that after the verdict of the jury and the decision of the court as to the compensation which is to be paid, other questions may arise in the cause; that the statute provides for an application by supplemental petition in the same cause upon which action can be taken; but it will be recollected that at the time she made her application there was no question of that kind made in the State Court. The only controversy—if we concede, as we must, I suppose, that this property was subject to condemnation—was as to the compensation which was to be paid to her. That was the only question which could come before the jury, and the only one on which the court could be called upon to render a judgment or decree. It might be, that, as between her and the city, no other controversy would ever arise. She might agree, perhaps, to the amount of the assessment and benefits that should be set off, so far as she was concerned, for the opening of the street. That was a matter remaining in the future, and whether there would ever be a controversy or not we cannot absolutely say. We have no judicial notice of the fact that there is to be any controversy beyond the controversy as to the compensation that shall be paid.

If it be admitted that there are difficulties connected with the decision of the case either way,—the removal of

the case or refusing it,—we cannot see how, consistently with the decision of the Supreme Court of the United States in *Boom Co. vs. Patterson*, *supra*, if this is one single controversy between Mrs. Martin and the city, which can be fully determined as between them, we can deny the right of removal. It was conceded by the counsel for the city that if this were only one lot, or one block, or howsoever large a piece of property it might be, which was owned by a single individual, or owned jointly by several, there could be no question of the right of removal under the decision of the Supreme Court. That being so, we do not see how the fact that two or more lots being joined in the application for condemnation can make any difference in the principle. So that those two questions remain as previously decided.

I come now to the effect of the removal of the case or suit as between her and the city. Does it bring with it all the other different controversies in the case? We have to concede that in one sense this is a suit between the city and all the different defendants, known and unknown, named. But one petition is filed; but one summons is issued. That summons is served upon all that can be reached. There is but one publication, and, when this is accomplished, it is conceded that the court is empowered to act. It is, then, in one sense, a suit between the city and all those different defendants, both known and unknown; that is to say, it is nominally a suit, but in fact and in substance, as to the question which was at that time to be decided by the court, there was a series of suits and a separate and distinct suit between the city and each owner of the lots sought to be condemned. As a matter of convenience and practice, there is but one petition and one summons is issued, but the controversies between the city and the various parties are distinct and separate.

The verdict of the jury was to be separate and distinct in

each case. The judgment of the court was also to be separate and distinct in each case. As I stated before, as to Jane E. Martin, she had no controversy with the other parties. Her controversy was alone with the city; and whatever might be the result as between them, it did not so affect the controversy between her and the city as to make it joint in any legal sense; no further than that the parties have been brought into court by one petition, and one summons has issued upon it.

In taking this view of the case I concede we have, to some extent, to qualify the general principle laid down by the Supreme Court of the United States in the case that went up from Minnesota, and which has been so fully argued by the counsel. *Barney vs. Latham*, 103 U. S. 205. In that case there were several controversies between the parties, and the Supreme Court of the United States held that it did not deprive the court of jurisdiction, and did not prevent the various controversies in the case from being brought into the Federal Court, when application was made for removal by one of the parties to a separate controversy. All I can say about that is, that to some extent the various questions in that case were blended together, although separate and distinct. But it is clear, I think, that this kind of a case was not in the mind of the Supreme Court when it made that decision, and if it had been, it would have modified the language, or the principle would not have been stated in such broad terms as are contained in the opinion of the court.

The condemnation proceeding by the city is something unique and unlike an ordinary case at law or in equity, and resting wholly on the authority of the statute of the state, which describes the mode of proceeding.

The conclusion is that this, so far as the question of removal is concerned, is a separate suit between the city and Jane E. Martin. In form the whole is one suit, in which

there are many defendants; but in substance and reality one suit, in which each defendant who owns a particular lot is a party, and the controversy between the city and him or her, is sole.

Perhaps I ought to make a remark as to the effect of any subsequent action that may be taken on the part of the city for the purpose of raising the money necessary to pay the compensation which may be awarded the owners of the different lots. It is not necessary now to decide what may be the effect of this ruling upon an application of that kind, whether it may be made here or in the State Court; but, wherever made, it seems to me that there will still remain but one controversy between the city and Jane E. Martin, namely, what shall be the assessment and benefit as to her lot, which should be deducted from the amount of compensation which is awarded to her by the jury.

The result is that this court will take jurisdiction of the suit and controversy between the city and Jane E. Martin, and leave the other suits between the city and different owners of the property sought to be condemned, to be determined by the State Court.

ERICK THORSON *et al.* vs. PETER PETERSON *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1883.

1. BREAKING UP OF VOYAGE—WAGES.—A contract between a seaman and the master of a vessel for the round trip is broken by the breaking up of the voyage either by collision or laying up for winter; and the seaman is entitled to a *per diem* compensation for the time during which he has rendered service, and he may leave the vessel without helping to discharge her.

2. *Thorson vs. Peterson*, 10 Bissell, 530—affirmed.

Appeal from District Court.

C. E. Kremer, for libellants.

W. H. Condon, for respondents.

DRUMMOND, J.—This was a libel filed in the District Court to recover from the owners of the schooner Winnie Wing compensation for services rendered by one of the libellants, as mate, and the other as seaman, on board of the schooner. The libellants shipped on the schooner for a round trip from Chicago to Pentwater, Michigan, and back to Chicago, in November, 1880. The seaman was to receive $20 for the round trip, but the mate, as the preponderance of evidence shows was to be paid by the day. The District Court found there was due from the defendants to the mate the sum of $82.75, and to the seaman the sum of $58.50, for which a decree was rendered, and from which the defendants appealed to this court. The libellants shipped on the thirteenth of November, on which day the schooner left Chicago, but on

the following day a collision took place between the schooner and another vessel, by which the schooner was dismasted and rendered helpless, but after some days on the lake was towed into South Haven. The seaman then requested a discharge from the captain of the schooner on the ground that the voyage was broken up. The captain, however, declined to discharge him, and finally agreed, if he would proceed to Pentwater, he would do what was right by him, and accordingly the seaman, as well as the mate, did proceed to that point. They then claimed that they were entitled to their release without helping to discharge the vessel, and, as the voyage had been broken up, that they both had a right to so much a day for their services rendered, and the seaman claimed, and the captain yielded to the claim, that he was entitled to the amount of expense necessary to return to Chicago. The captain offered to pay both the mate and the seaman on the assumption that an agreement had been made for so much for the round trip, and he insisted that they should remain and aid in the discharge of the cargo. They, however, left the vessel, and the question is whether the defense is made out which claims they have forfeited all compensation for services rendered because of the facts stated. The round trip was not made; the schooner was disabled and could not make it, and remained at Pentwater during the winter.

It could hardly be expected, I think, that the libellants, in order to complete the contract as claimed by the schooner, should remain until the schooner had made the round trip in the following spring. It seems clear under the circumstances, that so far as the round trip was concerned, at any rate, the voyage was broken up on both grounds; in the first place, because the schooner was dismasted and thereby became incapable of making the round trip; and in the second place, the schooner was obliged to remain at Pent-

water during the winter. Under these circumstances, the question is whether the libellants were not entitled to a reasonable *per diem* compensation for the time during which they rendered service. I think they were. The contract implied between the captain and the seaman at South Haven, in consequence of which the latter proceeded to Pentwater on the schooner, was one independent entirely of that which was made at Chicago. It may be true that the collision was not the fault of the schooner, and there is certainly nothing to indicate that it was the fault of the libellants, and considering all the facts in the case it seems to me not unreasonable to require the defendants to pay the amount which was decreed by the District Court. The services were actually performed. The proof seems to indicate that the seaman, at any rate, was willing to release the schooner from the contract at South Haven, and I hardly think that the facts of the case warranted the defendants in taking an appeal from the decree of the District Court. That decree is therefore confirmed.

HENRY BOULTON *et al.* vs. SAMUEL MOORE.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JANUARY, 1883.

1. ADMIRALTY—BREAKING UP OF VOYAGE FOR WINTER ENDS CONTRACTS OF HIRING.—If seamen are hired late in the fall for a voyage on the lakes, and the vessel is obliged, on account of the approach of the winter season to lay up at some intermediate point until spring, the contract of hiring is thereby ended, and the seamen are not obliged, nor would they have any right to remain on board the vessel during the winter and until the opening of navigation in the spring under the original contract of hiring.

2. RIGHT OF SEAMEN TO WAGES AND EXPENSES.—When the contract of service is thus terminated by the breaking up of the voyage for the winter, the seamen are entitled to their wages up to that time, and to their expenses either back to the port of starting or to the port of destination as may be equitable under the particular circumstances of each case.

3. CONTRACTS.—Vessel owners may specially contract with seamen as to their respective rights in case of detention of the vessel for the winter at an intermediate port.

4. Affirming *The Zach Chandler*, 10 Bissell, 372.

Appeal from District Court.

C. E. Kremer, for libellants.

W. H. Condon, for respondents.

DRUMMOND, J.—This is a libel for wages and traveling expenses against the defendants, the captain and the owners of the schooner, Zach Chandler. The libellants shipped on the schooner at Chicago, on the eleventh and thirteenth days of November, 1880, for a voyage to Erie, Pennsylvania. The wages were to be four dollars per day. The schooner met with adverse weather, and the winter set in earlier than

usual, so that the schooner was obliged to lay up at Escanaba, in Green Bay, on the 23d of November. The captain, when it was ascertained that the schooner could not proceed on her voyage until the following spring, offered to pay the libellants the wages which had been earned, at the rate stated, up to that time, provided a full acquittance were given. The libellants refused to receive the wages on these terms, and claimed that their expenses should be paid back to Chicago, the place of shipment. This the captain declined to do, and the libellants did not consequently receive any compensation whatever, and therefore the libel was filed for the amount of wages due to them, and for their expenses from Escanaba to Chicago. There was no written contract made between the parties, no shipping papers signed, and nothing said by either party as to what would be the effect upon their rights, provided the voyage was delayed until the following spring.

It is not claimed that the voyage was absolutely broken up, or that it was prevented from being accomplished the next spring. The libellants did not offer to remain on board the vessel and complete the voyage. It seems to have been assumed between the parties that in consequence of the vessel being detained there during the whole winter, it did not become the duty of the libellants to remain, nor of the defendant to retain and pay them until the following spring. There would seem, therefore, to be great force in the position that the contract between the parties, however it may have been as to the voyage, was terminated by their voluntary act; but independent of this consideration, I am inclined to think that under the facts stated, the contract of hiring for the voyage must be regarded as terminated between the parties. Undoubtedly it was the expectation on both sides that the schooner would complete her voyage to Erie that fall; but, in the exercise of a reasonable discretion, having been laid up

at Escanaba for the winter, although the voyage might be resumed in the following spring, it could not have been anticipated as a part of the contract under such circumstances that the libellants would have the right to remain there all winter without any service rendered, at the high rate of wages named, or that it was the duty of the defendant to pay them those wages until the end of the voyage in the spring. The navigation between Chicago and Erie is suspended on an average at least four months in the year, and we think it is the general understanding both among seamen and vessel-owners that the necessary laying up of any vessel at any intermediate point, for and because of the winter, is considered in this and similar cases, just before the close of navigation, as terminating the contract of service, and that the seamen are at liberty to abandon the voyage, and the vessel has a right to employ other seamen in the spring when navigation opens. If the detention were only for a short time, then, perhaps, this rule would not prevail; but considering the time during which the vessel is detained, it seems as though this is the only safe course to be adopted in such a case. In this respect therefore, I agree entirely with the view taken of the case by the District Court.

The only real controversy in the case seems to be in relation to the expenses of the libellants from Escanaba to Chicago. They do not claim their wages during the time occupied by the trip, and therefore, strictly speaking, the question of wages during the journey does not arise. When they were discharged at Escanaba, the captain offered them their wages up to that time, on condition that a receipt in full were given; and it is claimed that this constituted a tender in the admiralty law of the amount that was actually due at the time. It is true that the same strictness does not exist as to tenders in admiralty as at common law. The rule as stated in 2 Pars. Shipp. & Adm. 484, is that "any real offer to pay by one then

ready and willing to pay is treated as a valid tender, without inquiry whether the money was produced or not, or in what form." But in this case the tender was made, subject to the condition that a full acquittance should be made, and the offer to pay was not renewed in the answer, nor, so far as appears, was it ever afterwards repeated on the record before or during the progress of the litigation. No written intimation was given to the court after the decree of the District Court, and it has not at any time been renewed in this court, although the counsel has said that his client has always been willing to pay that amount. Of his ability to do so this court has no knowledge. In a case cited in the notes to Parsons, one fact which constituted in the opinion of the court a sufficient tender was that it was renewed in the answer, and that was a case where the tender was accompanied with a request for a receipt. Page 484, note 1. In this case the District Court allowed the libellants their wages up to the time of their discharge and their expenses from Escanaba to Chicago, and the question is whether they were entitled to their expenses.

In the case of *The Steamboat Lioness*, 2 McCrary, 208, the District Court gave the libellants their wages from the time of their discharge up to the time of their return to the place of departure, as well as their expenses during their return. In that case the vessel, in the course of her voyage, encountered ice in the Mississippi river and the voyage was broken up. It does not appear how the voyage was broken up, nor whether it was by the mutual consent of the parties. The case decides that the libellants were entitled to their expenses and wages during their return, irrespective of the fact whether the discharge was caused by the fault or act of the vessel-owner. The reasoning of the court, however, appears to proceed on the assumption of a discharge without cause, or a wrongful discharge. The court lays down the rule as

well settled that it was the right of the mariners to be transported to their ports of shipment, leaving the inference that it was their right under the facts stated in the opinion. Of the numerous authorities cited in that case scarcely one can be said literally, however it may be in principle, to go to the length claimed by the court; that is to say, in a case where both parties must be presumed to know that the contract may be terminated by some act independent of either; for instance, by *vis major*, as in this case. Here, as we have assumed, there was no wrongful discharge or discharge without a cause, and there was no act done by the vessel-owner which terminated the contract between the parties. This was a verbal contract, but I do not see how, if it had been a written contract of the character proved, it could have affected the principle involved in this part of the case.

In the case of *The Hudson*, 8 Fed. Rep. 167, where the libellants, without any written articles, shipped on board of a packet running between Pittsburgh and Cincinnati, on the Ohio river, and on the arrival of the packet at Pittsburgh, the river being frozen over and navigation by means of ice having been suspended for eight days, were discharged, the court held that they were entitled to their wages up to the time of their return to the place of shipment, as well as their expenses during their return. In that case I think it may be inferred, perhaps, that the libellants were discharged without sufficient cause, and in that respect it was different from the case under consideration.

Judge STORY has decided in several cases that where a neutral vessel is captured, it does not necessarily break up the voyage. If the capture is wrongful, the vessel may be released and the voyage proceed, and he therefore calls it, under such circumstances, a mere suspension of the voyage; and he has held that the mariner, under such circumstances,

is entitled to his wages until his return to his country: *Brown vs. Lull*, 2 Sumn. 443; and see *Brooks vs. Dorr*, 2 Mass. 39.

The acts of Congress do not provide for the payment of the wages of mariners, or their expenses back to the port of departure, where there is no fault committed or act done by the vessel-owner. Whenever a vessel is sold in a foreign country and the seamen discharged, then three months wages are to be given to them. Rev. St. section 4582. Where the service of the seamen is terminated before the period contemplated by the agreement, in consequence of the wreck or loss of the vessel, the seaman is entitled to his wages up to the time that the contract is thus terminated, but not for any further time. Rev. St. section 4526. It would seem that in the case of a delay for repairing a vessel, or in consequence of capture, it becomes a question whether the delay is a reasonable one. If it be long continued, depending somewhat, of course, upon the cause of the delay, then it would seem as though the contract between the seamen and the vessel-owner must necessarily be terminated. 2 Pars. Shipp. & Adm. 86; and see *Woolf vs. Brig Oder*, 2 Pet. Adm. 262.

Judge Story admits that in a case of capture, followed by condemnation, the contract is dissolved, and the seamen lose their wages, unless there is a subsequent restitution of the property, or of its equivalent value, with an allowance of freight; and he says that it is the duty of the mariners to remain by the ship as long as there is any hope of recovery of the property; but the question recurs, how long is the mariner to wait until these facts are ascertained? And so in the case of repairs. Undoubtedly, if they can be completed within a short time, the contract remains. But suppose that it takes many months, or a year, or more, to make the repairs, as we can easily imagine there may be cases where it may take that time, is the contract

still to continue between the seamen and the ship-owners? The extent to which some of the courts have gone in allowing the wages of seamen is shown by the fact that they have permitted the representatives of the seamen to recover wages for the whole voyage, although the seamen may have died long before the voyage was terminated: 2 Pars. Shipp & Adm. 58, note 4, and cases there cited; and so when the seaman was sick and left in a foreign port: *Brunent vs. Taber*, 1 Sprague, 243. In examining the cases cited, and others which might be named, one cannot avoid the conclusion that the courts of admiralty have adopted rules much more liberal to seamen than are applied to other persons who ordinarily make contracts with each other. They have appeared studious to guard at every possible point what may be considered as the equities of the sailor. They do not apply the same strict rules of construction to the contracts which he makes as in the contracts of other persons. If there is anything in the contract which the court thinks hard or unfair to the seamen, the court requires clear evidence that he made the contract with a full knowledge of what it contains, and gave his assent to such clauses therein written, and in the case of any unforeseen event occurring, or one not provided for or anticipated, perhaps it is not too strong an expression to say that the courts construe the contract upon the assumption of what the sailor would have claimed or inserted if the event had been foreseen or anticipated. Their contracts are regarded by the courts of admiralty under the influence of feeling quite as much as of logic. As "wards" of the court, they are treated with the tenderness of a guardian.

This was a contract for a service to be performed on board of the schooner in November, for a voyage between Chicago and Erie, Pennsylvania. The term of service did not extend further than the arrival of the schooner at that port. As has been already intimated, it must be presumed to have been

within the knowledge of both parties that there was a chance for the voyage to be arrested by the approach of winter, and by obstructions caused by ice. It has been stated that a contract of service, as such, according to what is believed to be the universal understanding upon these lakes, is terminated by the necessary laying up of the vessel in the fall for winter; but there remains the question as to what is the right of the seamen when the voyage is thus terminated, where the contract is silent in case of the detention of the vessel from the causes named. Under ordinary circumstances, we think, it could be truly said that the event having happened which both parties had the right and whose duty it was to anticipate, that each was left entirely free; that the service having terminated, payment for the service actually performed would release the vessel-owner from all further obligations. On principle, it seems that no other rule could be established; but, as has already been said, this is not a case between ordinary persons, but a case between seamen and the owners of the vessel where circumstances have occurred which have not been provided for in the contract. As was intimated by the District Court in its opinion, we can imagine that cases might arise where it would become a question, even conceding that the expenses of the seamen were to be paid, to what point they might go,—whether to the point of departure or to the port where the voyage was to terminate; in this case the first being at Chicago, and the second at Erie. No doubt difficult questions might arise, in similar cases—depending upon the place between the two ports where the voyage was terminated for the season; but those would have to be decided under the special circumstances of each case, and need not now be anticipated. The libellants desired to return to the place of departure, and it was not proposed to send them to the port of destination; in

fact, the expense and difficulty of reaching that port were much greater.

In looking at the general current of authorities upon the questions involved here, it seems as though the court could not escape the conclusion that, in favor of the seamen, their expenses should be allowed in this case, because they are seamen, and because a court of admiralty is bound specially to regard their interest.

The case has been the more fully considered by the court, and some of the questions which only arise, perhaps, incidentally in the case, have been discussed and decided because of the general desire which has been manifested that the court should lay down some rule which shall govern in cases of this kind; and it may be as well to state, although the question does not necessarily arise in this case, that the same rule which would award the libellants their expenses from Escanaba to Chicago, would also, although the claim was not here made, give them their wages during the short time occupied in the journey between the two places.

The question of wages and of expenses, where seamen are left on these lakes in the fall, under the circumstances which occurred in this case, is one of very considerable practical importance, because it is occurring in many instances every fall and winter. It would be desirable, as there has been so much controversy on the subject, that it should be determined by the Supreme Court of the United States; but in all cases where these questions arise, the amount involved is so small that it is hardly possible that they should go before that court, unless, perhaps, when the circuit justice and circuit judge sit in the Circuit Court, in an admiralty appeal, and they should certify the questions to the court of last resort: *Ins. Co. vs. Dunham*, 11 Wall. 1; *U. S. vs. Emholt*, 105 U. S. 414.

The result of the whole matter is that this court substan-

tially agrees with the District Court, and will allow the libellants their wages up to the time of their discharge, and their expenses; and I think, as there is not the same sum due to each, the amount should be allowed to each libellant, and not, as the District Court found, an aggregate amount due to the libellants together.

It will be seen that it is important that vessel-owners should have a written contract with the seamen, in which provision can be made, in any contracts entered into near the close of navigation, as to the rights of the seamen in case of the detention of the vessel at an intermediate port during the winter.

Where such contracts are fairly made and well understood by the seamen, there can be no doubt they would be binding on them.

See also *Thorson vs. Peterson*, *ante*, page 497. [*Reporter.*

DAVID J. TYSEN, JR. vs. THE WABASH RAILWAY COMPANY *et al.*

CIRCUIT COURT—DISTRICT OF INDIANA—FEBRUARY, 1883.

IN EQUITY.

1. RAILROADS—PURCHASERS OF BONDS MUST TAKE NOTICE OF RIGHT TO CONSOLIDATE.—Persons who purchase bonds of a railway company while a statute is in force authorizing the consolidation of railroads, must be held to have contemplated at the time of the purchase of the bonds, that the railway issuing them, might consolidate with other railroad companies.

2. CONSOLIDATION.—If several railroads consolidate, the consolidated company assumes the liabilities and succeeds to the rights of the constituent companies.

3. A consolidated railroad company may execute a mortgage upon all the consolidated property which will be paramount to the unsecured indebtedness of the constituent companies.

4. CREATION OF EQUITABLE LIEN BY CONSOLIDATION.—Where two or more railroad companies consolidate, and part of the consideration for the transfer of the property of one of the roads to the consolidated company is the payment by it, of certain unsecured equipment bonds issued by that constituent company, which bonds the consolidated company agrees to "protect," the holders of the equipment bonds acquire thereby an equitable lien on the property of the consolidated company for the payment of their bonds.

The lines of railway belonging to the Wabash Railway Company were formerly owned by different corporations, which respectively issued bonds for large amounts at different times, most of which were secured by mortgages or trust deeds upon their respective roads. In 1862 the Toledo & Wabash Railway Company issued a series of equipment bonds to the amount of $600,000, with interest at 7 per cent., payable semi-annually, the principal being due May 1,

1883. These bonds were not secured upon the road in any way but each bond bore upon its face the words "Equipment Bond." At the time of their issue the railway company had outstanding a large amount of other bonds secured by various mortgages.

In 1865, the Toledo & Wabash Railway Company became consolidated with the Great Western Railroad Company and other companies, and formed the Toledo, Wabash & Western Railway Company. In the articles of consolidation it was agreed that the consolidated company should "protect" certain specified bonds and other debts, principal and interest as the same should fall due. These equipment bonds were included in the indebtedness, which the consolidated company was to "protect."

In 1867, the Toledo, Wabash & Western Railway Company executed what was called the "consolidated mortgage" upon all of its property to secure an issue of bonds to the amount of $15,000,000, this issue being for the avowed purpose of refunding the indebtedness of the company, and the purchase of additional equipment.

These equipment bonds were described in the "consolidated mortgage" among those which were to be refunded under the terms of that mortgage. This funding scheme, however, was subsequently abandoned. In 1873, the consolidated Toledo, Wabash & Western Railway Company, then owning and operating the entire line of railway subsequently owned and operated by the Wabash Railway Company, executed what was known as the "Gold Bond" mortgage, and in February, 1875, proceedings were instituted by certain parties holding bonds secured by this mortgage, seeking a foreclosure, and in June 1876, all of the property covered by the "Gold Bond" mortgage was sold under a decree, at public auction, when John Ellis and others became the purchasers for $2,500,000. That sale and purchase were subject by agreement to all mortgages

prior in time to the "Gold Bond" mortgage, the priority and continuance of all prior mortgages, and liens being expressly reserved in the decree and declared in effect by the sale, and "without prejudice to any claim that may be made by the holders of the bonds called equipment bonds." The purchase by Ellis and others was made in pursuance of an understanding previously had among those interested in the property. And these purchasers organized a new company with a capital of $16,000,000, which was the Wabash Railway Company.

Interest on the equipment bonds was regularly paid up to and including that due on the first day of November, 1875. But the purchasers at the sale of 1876, and their successor company, the Wabash Railway Company, declined and refused to pay further interest, or in any way to recognize these bonds. Suit was commenced in a circuit court of Indiana, and removed by the Railway Company to this court. The Wabash Railway Company having since been consolidated, the consolidated company, the Wabash, St. Louis & Pacific Company was joined as a defendant in possession.

Charles W. Hassler, for complainant.

Wager Swayne and *Baker, Hord & Hendricks*, for defendants.

GRESHAM, J.—No lien of any kind existed in favor of the holders of the equipment bonds prior to the consolidation in 1865. It cannot be disputed that before this consolidation, which was authorized by law and untainted by fraud, the Toledo & Wabash Company might have executed a mortgage upon all its property, which would have been paramount to all its unsecured indebtedness, including the equipment bonds. The statute authorizing the consolidation of railroads and their possessions was in force when the

equipment bonds were issued and sold, and it became a part of the contract between the Toledo & Wabash Company and the purchasers of those bonds. The purchasers must therefore be held to have contemplated, at the time they bought their bonds, that the Toledo & Wabash Company could, and possibly would, consolidate with other railroad companies. The result of a consolidation under the statute is that the consolidated company assumes the liabilities and succeeds to the rights of the constituent companies. That being so, it follows that the consolidated company may execute a mortgage upon all the consolidated property, which will be paramount to the unsecured indebtedness of the constituent companies.[1]

Was there anything in the terms of the consolidation of 1865 that gave to the holders of the equipment bonds a security or lien which they had not before? Did the consolidated company take the property and franchises of the Toledo & Wabash Company with an incumbrance which did not rest upon them before?

It was competent for the constituent companies to agree upon their own terms of consolidation provided they were not in violation of the statute authorizing consolidation. The property and rights of the Toledo & Wabash Company, at the time of the consolidation, were estimated to be worth $10,000,000. Part of the consideration for the transfer of this property to the consolidated company was the payment of the $600,000 of equipment bonds. The consolidation agreement contains the following:

"It is further agreed that the bonds and other debts herein above specified and not otherwise provided for in this agree-

[1] *McMahan vs. Morrison*, 16 Ind. 172; *Indianapolis C. & L. R. Co. vs. Jones*, 29 Ind. 465; *Jeffersonville, M. & I. R. Co. vs. Hendricks*, 41 Ind. 50; *Paine vs. Lake Erie & L. R. Co.*, 31 Ind. 283.

ment shall, as to the principal and interest thereon, as the same shall respectively fall due, be protected by the consolidated company according to the true meaning and effect of the instruments or bonds by which such indebtedness of the several consolidating companies may be evidenced."

The equipment bonds are embraced in the schedule of bonds and debts referred to in this clause. The agreement to pay these bonds as a part of the purchase price of the property put into the consolidation by the Toledo & Wabash Company was made for the benefit of the equipment bondholders, who thus acquired an equitable lien on such property. This lien is good against all persons, except subsequent purchasers without notice.

When the consideration for conveyance of property is the payment by the vendee of the debt to a third person, a lien exists upon the property conveyed for the benefit of such third person.[1]

It was no doubt the intention of the Legislature in passing the statute authorizing the consolidation of railroad companies that the consolidated company should be substituted for the constituent companies and that the unsecured indebtedness of the latter should remain unsecured indebtedness of the former. While this is the result of a consolidation under the statute, as already stated, the consolidation may be on such terms as suit the contracting parties, provided these terms do not violate the statute. One of the stipulations of the consolidation agreement was payment by the consolidated company of the equipment bonds. The language of this part of the agreement, considered in connection with the terms and recitals of the consolidated mortage, the consolida-

[1] *Nichols vs. Glover*, 41 Ind. 24; Story Eq. 1244; *Clyde vs. Simpson*, 4 Ohio St. 445; *Vanmeter vs. Vanmeters*, 8 Grat. 148; *Harris vs Fly*, 7 Paige, 421; *Hallett vs. Hallett*, 2 Paige, 15.

tion agreement of 1868, the deed of further assurance and the prompt payment of interest on the equipment bonds, semi-annually as it became due for eight years after 1865, shows that something more was intended then the mere assumption of an unsecured indebtedness. The proceeds of the equipment bonds had been expended in the betterment of the property of the Toledo & Wabash Company; that company was to pass out of existence, and its entire property was to become part of the possession of the consolidated company. For this reason, it may have been thought just to the owners of equipment bonds that they should have security in the nature of a lien on the property superior to any rights that might thereafter be acquired. We may assume that it was well understood by all the parties to the consolidation agreement of 1865 that the consolidated company, by the mere force of the statute which authorized its creation, was bound to pay all the debts of the constituent companies. No one understands that better than the counsel who drew up the consolidation agreement. If nothing more was contemplated by the clause quoted from this agreement than a promise to pay the equipment bonds as unsecured indebtedness, why was the word "protect" used? If the counsel of the defendants are correct in their interpretation of that word, its use was wholly unnecessary. Whenever it fairly appears from an instrument, notwithstanding its form, that it is intended to afford a security, an equitable lien exists in favor of the person for whose behalf the provision is made. Jones on Mortgages, 162.

The Wabash, St. Louis & Pacific Company now owns and operates the property which the Toledo, Wabash & Western Company acquired from the Toledo & Wabash Company, and denies its liability on the equipment bonds. There is nothing to prevent the holders of these bonds from asserting against the present owners of this property the equitable lien which

they were entitled to under the consolidation agreement of 1865. All subsequent interests have been acquired with knowledge of this agreement.

These are briefly my reasons for holding that the equipment bonds are a charge upon the property now owned by the Wabash, St. Louis & Pacific Company, which originally belonged to the Toledo & Wabash Company.

A decree will be entered declaring such a charge, and for accrued interest.

The case would have been decided at an earlier day but for a statement made by the complainant's counsel that the matter in dispute might be amicably adjusted.

A motion for a rehearing in this case was argued before Mr. Justice HARLAN and Judge WOODS, and overruled, and a decree was ordered to be entered in accordance with the foregoing opinion. [*Reporter.*

W. I. CRANDALL *et al.* vs. THE GOODRICH TRANSPORTATION COMPANY.

CIRCUIT COURT—EASTERN DISTRICT OF WISCONSIN—FEBRUARY, 1883.

1. SPARK ARRESTERS UPON STEAM-VESSELS—NEGLIGENCE.—Though a steam vessel be provided with all the equipment, machinery and mechanical appliances required by the Act of Congress regulating steam vessels, yet the failure to use a spark-arrester in or upon her chimney may be negligence, and the question whether it is so or not is one for the jury under the special facts of the case.

2. SPREADING FIRES—PROXIMATE CAUSE.—If a planing mill is set on fire negligently by sparks from a steam vessel, and a house at some dis-

tance from the mill is fired by sparks from it, the owners of the vessel are liable for the burning of the house if their negligence in the first instance was the proximate cause of its burning.

3. If the burning of the house was a result naturally and reasonably to be expected from the burning of the mill under the circumstances then existing, and was the result of the continued influence or effect of the sparks from the vessel without the aid of other causes not reasonably to be expected, then the owners of the vessel are liable.

4. Injury Resulting from Two Concurring Acts of Negligence—Each Party Liable.—The fact that the owner of the planing mill negligently left combustible material on the mill dock, in consequence of which the fire was started at that place by the sparks escaping from the vessel, will not of itself relieve the owners of the vessel from liability for the injury occasioned by the spreading of the fire to the other house, if they were guilty of negligence in allowing the sparks to escape from the vessel.

Cameron, Losey & Bunn, Robert Rae and *C. E. Vroman*, for plaintiffs W. I. Crandall and Phœnix Insurance Company.

E. H. Ellis, Hastings & Greene, Jas. G. Jenkins and *H. M. Finch*, for defendant, The Goodrich Transportation Company.

Dyer, J., in charging the jury said:

It is alleged by the plaintiffs, that on the 20th day of September, 1880, the steamer Oconto, a boat belonging to the defendant company, was navigating the waters of Fox river within the limits of the city of Green Bay; that in consequence of the negligence of the defendant, and of those in charge of the boat at the time, sparks escaped from the chimney of the steamer to the shore, and there set a fire which destroyed a certain dwelling house then owned by the plaintiff Crandall; and this suit is brought to recover the value of the building thus destroyed. It appears that at the time of the fire, there was insurance upon the house to the extent of $4,000, the plaintiff insurance company having previously issued to the owner a policy of insurance for that

sum. After the fire the insurance company paid to the owner the amount of such insurance, and thereupon the plaintiff Crandall transferred to the company his claim against the defendant, to the extent of $4,000, by virtue of which transfer the insurance company became subrogated to the rights of the owner to the extent of the amount of the insurance. It is admitted that the value of the dwelling house was $5,846.81, and as this value exceeds the amount of the insurance, the owner of the building and the insurance company join as plaintiffs in this suit, as they may rightfully do.

There is not, as the court understands, any dispute about the fact that the fire in question began in the planing mill or on the planing mill dock so often spoken of in the testimony; and it is claimed by the plaintiffs that the fire was set by sparks escaping from the steamer while she was passing up Fox river, and as she was approaching the draw of Mason street bridge; that the fire extended from the planing mill in a northeasterly direction, and in its course consumed the house of the plaintiff Crandall, which, according to the testimony of one of the witnesses, was situated between 850 and 900 feet from the mill.

The first question, therefore, to be determined by you is, did the fire which burned the planing mill or planing mill dock originate from sparks escaping from the steamer: I say the *first* question, because if you should find that the fire at the planing mill was *not* caused by sparks from the steamer, that is an end of the case, and your verdict in that event should be for defendant. But if your conclusion should be that the burning of the planing mill was caused by sparks from the steamer, you will then proceed to inquire and determine whether, in the equipment of the steamer, in her management and in the control exercised over her on that day, proper precautions were taken by the owners of the boat or those in charge of her to avoid doing injury to others; in other words, whether

the fire was occasioned by negligence on their part. To maintain this action it is essential that in some one or more of the particulars alleged, negligence be shown. The foundation of the plaintiff's claim is that the fire was caused by want of proper care on the part of the defendant and its employés in charge of the steamer at the time, and unless such want of care is established by the evidence there can be no recovery.

As is stated in one of the instructions which I am asked to give you, the gist of the action is the negligence of the defendant; unless that be established, the defendant is not liable. The presumption is that due care was exercised and the burden of proof is upon the plaintiffs to show by a preponderance of credible evidence that the defendant has been guilty of negligence. It is incumbent upon them to satisfy you that the defendant, by its act or omission, violated some duty imposed upon it and that such violation caused the injury complained of.

Negligence is claimed in three particulars. It is said, *first*, that on the day in question an unusually violent wind was blowing and that its course was such as to carry escaping sparks and cinders from the steamer directly toward and upon the city of Green Bay; that a drouth had prevailed and that it was then uncommonly dry; that the east shore of the river was lined with wooden buildings and docks upon which there was combustible material; that the officers of the boat knew the topography and condition of the shore, and that in view of the alleged force and direction of the wind, the state of the weather and all the circumstances existing at the time, it was negligence on the part of the officers of the boat to proceed up the river toward Depere; and it is claimed that in so doing those in charge of the steamer were guilty of gross carelessness. *Secondly*, it is said that the boat was not prudently and carefully operated, and that this alleged want

of care consisted in using her steam exhaust inside her chimney, thereby increasing the draft through the chimney, which it is claimed would have a tendency to cause a much greater emission of sparks than would take place if the exhaust was outside the chimney or than would occur if there was what is called a natural draft through the chimney. *Thirdly*, it is claimed that it was negligence not to have a spark-arrester in or upon the smoke stack of the steamer.

These are the three principal allegations of negligence made by the plaintiffs, and each one of them is controverted by the defendant.

In considering whether the defendant was or was not negligent, the test which the law applies and which you should apply, is, what would an ordinarily careful and prudent person have done with reference to the employment of the boat in navigation at that place on that day, and with reference to her management and the use of a spark-arrester, under the precise circumstances then existing. Negligence is the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. It must be determined, in all cases, by reference to the situation and knowledge of the parties and all the attendant circumstances. The law does not charge culpable negligence upon any one who takes the usual precautions against accident which careful and prudent men are accustomed to take under similar circumstances. *The Nitro-glycerine Case*, 15 Wall. 524. In short, the defendant and those in charge of the steamer were bound to exercise reasonable care in operating and managing her, and by that is meant such care as a person of ordinary prudence would be expected to exercise in the circumstances existing at that time and place.

As before stated, in connection with the question first

submitted to you, there is a controversy between the parties as to the direction and force of the wind when the steamer passed up the river and through the draw of Mason street bridge. It is claimed by the defendant that it was not hazardous to property on shore, or imprudent, for the boat to leave her landing and proceed on her voyage to Depere; that it was the right of the vessel to navigate the river at that time and place; that she was prudently and properly managed; that her steam exhaust was outside the chimney; that she was equipped as the law requires; was provided with all safe and necessary appliances to prevent the escape of sparks, and that the use of such a spark-arrester as the plaintiffs insist should have been attached to her chimney, was not necessary or practicable, nor required by the circumstances of the situation.

In determining whether it was prudent and proper for the steamer to leave her landing and proceed up the river, and whether she was operated with due care, you will consider all the evidence on the subject, and also the entire situation; the direction and force of the wind; the material of which the planing mill and dock were constructed; the condition of the dock with reference to combustible material thereon; the distance that the steamer was from the planing mill; whether the master of the steamer knew the character and condition of the buildings and docks along the river on the Green Bay side, including the planing mill and its dock; whether, in approaching and entering the draw of Mason street bridge, the fire in the furnace of the boat was increased so as to make escaping sparks unusually dangerous; whether there was a prudent use of the power of the engine in the existing circumstances; whether the steam exhaust was inside or outside of the chimney, which is a controverted question of fact, and one that you must settle upon the testimony; whether, in short, as I have before said, such care

and prudence were exercised in controlling the movements of the boat, as ordinarily prudent persons would have exercised in like circumstances.

Concerning the use of the spark-arrester in the chimney of the steamer, the defendants take the position that if the vessel was provided with the equipment, machinery and mechanical appliances required by the act of Congress regulating steam vessels, this was sufficient, and that negligence is not imputable to the defendant because of the absence of a spark-arrester in the chimney of the steamer. I have given this question consideration and have concluded that the court ought not to instruct you, as matter of law, that the owners of the boat were not bound to use a spark-arrester in or upon the chimney of the boat, but that it should be left to you to say upon the evidence whether or not the defendant was guilty of negligence in that respect. And here again the test is, what would an ordinarily careful and prudent man, owning such a boat as this, have done in regard to having an appliance in or upon her chimney to prevent the escape of sparks.

Much testimony has been introduced relative to the use and the practicability of using a spark-arrester on the Oconto and on steamers of her class. It is claimed by the plaintiffs that such a spark-arrester as has been described to you would have prevented the escape of sparks from this steamer and would therefore have prevented the fire; that it is a device in use on many of the lake boats, that it could have been efficiently employed on the Oconto, and that prudence and a due regard for the safety of property on shore required its use on the occasion in question.

On the other hand it is said that the use of such a device is not consistent with the safety of the boat, that by getting clogged it operates like a damper, and so tends to obstruct the draft through the chimney and thus to interfere with the mo-

tive power of the boat; that when in condition for use it does not prevent the escape of sparks; that it has been found impracticable to use it, that the law applicable to steam vessels does not require its use, and therefore, in view of these various considerations and others that have been suggested, the defendant was not bound to have such an appliance on this steamer.

Now, it is for you to say what was the duty of the defendant in this respect. What would an ordinarily prudent man who owned a boat like this, have done in regard to using a spark-arrester? In answering this question, you will take into account the manner in which the steamer was equipped with reference to her machinery and all her mechanical apparatus; if her equipment in that respect was such as the law requires, you may take that into consideration; you will consider whether this appliance in question has been found to be generally used by prudent and careful men in the management of vessels and steam power; what is the general usage, what have been the experiments made, and what are the opinions and experience of those who have used spark-arresters on boats; consider the situation and surroundings of the steamer at the time when it is alleged the fire was set; whether a spark-arrester would have operated efficiently to prevent the escape of sparks; whether its use would have in any degree endangered the safety of the boat itself; you will consider what appliances the boat had for controlling or regulating the escape of sparks; to what extent, if at all, the outside exhaust diminishes, and the inside exhaust increases, the quantity of sparks produced and their escape through the chimney; and in the light of all the circumstances you will say whether there was any duty imposed on the defendant to have a spark-arrester on this steamer at the time the fire complained of occurred. *Kellogg vs. M. & St. P. R'y Co.*, 5 Dill. 548.

* * * * * * *

Upon this general question of negligence I need only add, in substantially the language of Mr. Justice MILLER, in the case of *Kellogg vs. The Milwaukee & St. Paul Railway Co.*, 5 Dill. 543, that with the elements of transportation used in commercial transactions and with the great bulk of material transported to and from different parts of the country, the use of steam power has become not only necessary but indispensable to the interests of the whole country, and you may properly consider how far the interests of the public require those using this great power to be restricted, and how far the good of the people require those making use of it to adopt means of safety and protection. Steam and fire are dangerous elements, but they must be used. The defendant and its employés had a right to employ the steamer Oconto in navigating the waters of Fox river, but they were required to exercise such care and prudence as I have before stated to you, and the question is, was there anything in the circumstances and situation at the time in question to put those exercising control over the boat on their guard? Did they exercise due care and prudence, such as an ordinarily prudent person would have exercised? This is the gist of your inquiry.

If your conclusion shall be that the planing mill fire was set by sparks from the steamer, but that it was not the result of any negligence on the part of the defendant or those in charge of the boat, then the plaintiff cannot recover, and the case would necessarily stop at that point. But if you find that the fire originated from sparks from the Oconto, and that it was caused by negligence on the part of the defendant or those having control of the boat at the time, as claimed by the plaintiffs, then the next question to be considered by you is, was the burning of the Crandall house so connected with the burning of the planing mill as to make the defendant responsible for the loss of the house? In

other words, the inquiry at this point is, what was the proximate cause of the burning of the Crandall building, and this is a question for the jury, to be determined as a fact in view of the circumstances of fact attending it. *Kellogg vs. Railway Co.*, 4 Otto, 474. It is shown by the evidence, and not disputed, that between the planing mill and the Crandall building were other structures, which happened to be situated in and near to the path of the fire, some of which were saved. There is testimony in the case tending to show that burning brands and cinders were carried through the air by force of the wind, from building to building, and that thus they were destroyed. Now, it is claimed by the plaintiffs that the burning of the Crandall house was the result of the continued effect of the sparks from the boat, without the aid of other causes not reasonably to be expected and naturally following from the burning of the planing mill, and therefore that the alleged negligence of the defendant was the proximate cause of the plaintiff's loss. This is controverted by the defendant. The rule by which you are to be guided in determining this question of proximate cause is not a difficult one. If any difficulty exists in this case with reference to the rule, it arises in applying it to the facts. Before stating the principle by which you must be controlled in considering this question, I ought in this connection to pass upon another question concerning which several instructions are asked by the defendant. It is claimed that the owner of the planing mill was guilty of negligence in leaving combustible material, such as shavings and sawdust, on the planing mill dock; and it is contended that if in consequence of the presence of this inflammable material, negligently left on the dock, the fire was started at that place by sparks from the boat, such negligence of the owner of the planing mill, will itself defeat a recovery, even though the defendant was negligent. I do not think this is so. In other words.

I am of the opinion that the alleged negligence of the owner of the planing mill does not of itself relieve the defendant from liability for its negligence if it was negligent. And this I hold upon the authority of cases in which it has been decided that where an injury is the result of two concurring causes, the party responsible for one of these causes is not exempt from liability because the person who is responsible for the other cause may be equally culpable.

Now, gentlemen, in order to reach the conclusion that the alleged negligence of the defendant was the proximate cause of the burning of the Crandall house, you should be satisfied that the burning of that house was the natural and probable consequence of the defendant's negligent act—if it was negligent—and that it ought to have been foreseen in the light of the attending circumstances. You will consider whether the burning of the planing mill was occasioned by sparks from the steamer; if it was, then was the burning of the Crandall house a result naturally and reasonably to be expected from the burning of the planing mill under the circumstances then existing, and was it the result of the continued influence or effect of sparks from the boat without the aid of other causes not reasonably to be expected? And the circumstances to be considered in determining whether or not the burning of the Crandall house was a result naturally following from and naturally and reasonably to be expected from the burning of the planing mill, are, among others, the strength and course of the wind at the time, the material of which the planing mill and dock and the buildings between the planing mill and the Crandall house were composed, the distance between the planing mill and the Crandall house, the distances between the different buildings that were situated in the path of the fire, the state of existing facilities on shore for arresting the fire, and any and all other circumstances and facts bearing upon the question as

developed by the evidence. In determining whether the burning of the Crandall house was or was not a consequence of the burning of the planing mill naturally and reasonably to be expected, you will consider it in the light of all the circumstances as they existed just before the fire. The question is not, you will notice, what the captain of the boat did in fact expect or anticipate. The question is what would any reasonable person in the then existing circumstances have naturally and reasonably expected to be the result of the burning of the planing mill. It is true, as I am requested to instruct you, that no person is responsible for every consequence, however remote, of his wrongful acts, but only for such as in the circumstances naturally follow and may naturally and reasonably be expected to be the result of his acts.

One of the tests by which to determine whether the burning of the Crandall house was the result of the continued effect of the sparks from the boat—if such sparks caused the fire at the planing mill—is to ascertain whether there was any intervening cause between the burning of the planing mill and the fire at the Crandall house, which could not reasonably have been anticipated and which produced the injury. Was there any such in this case—that is, a cause not connected with the original negligence—if there was negligence—and not reasonably to be expected and but for which the Crandall house would not have been burned? If there was, then of course the burning of that house should be attributed to that cause and the defendant would not in that event be answerable for the consequences. As, for example, if, after the ignition of the fire at the planing mill the direction of the wind changed and its violence increased so that burning brands of cinders were carried to the Crandall house, and if that house would have been safe if the wind had not changed and its force had not increased, and if

such change in the wind could reasonably have been expected when the fire at the planing mill began, then and in that case the burning of the Crandall house might fairly be attributed to a new and independent cause for which the defendant would not be responsible.

But though you should find that there was no new and independent cause to which the burning of the Crandall house was attributable, it is still necessary for you to say whether the destruction of that house was a result naturally and reasonably to be expected and naturally following from the burning of the planing mill.

So, I may conclude what I have to say on this branch of the case by repeating, that if you find that the planing mill fire was caused by sparks from the steamer which escaped because of the negligence of the defendant or those in charge of the boat, and if the burning of the Crandall house was a result naturally and reasonably to be expected from the burning of the planing mill under the circumstances, and was the result of the continued effect of the sparks from the steamer without the aid of other causes not reasonably to have been expected, then you will be justified in concluding that the alleged negligence of the defendant was the proximate cause of the burning of the Crandall house. But if you find that the destruction of that house was not an event naturally and reasonably to be expected from the burning of the planing mill or was not the continued effect of the sparks from the boat without the aid of other causes not reasonably to have been expected, then the loss of the house should not be charged to the alleged original fault.

Yet another question remains to be submitted to you. It is claimed on the part of the defendant, that after the fire broke out, Kimball, the occupant of the Crandall house, did not, as it was contended it was his duty to do, remain at home where he could look after and protect the house against

the danger of fire and did not make proper exertions to check or prevent the burning of the house—in short, that he was negligent in this respect, and that in consequence of such negligence the loss occurred. Here again the rule of ordinary or reasonable care applies. It was the duty of the occupant of the house to exercise such care over it, and to make such exertions to protect it against threatened destruction by fire, as a reasonably cautious and prudent man would be expected to exercise in the same circumstances; and if he neglected to use such care and if the want of it contributed proximately to the loss of the house, then the plaintiffs cannot recover. In determining whether Mr. Kimball exercised ordinary care and diligence in the particulars mentioned, you will consider all the circumstances as they existed at the time; the location of the house, the direction of the wind, the course of the fire, the extent to which the house was threatened, whether the danger was or was not imminent, the time when the house was burned, and the efforts made to save it, and you will say whether there was any want of such care and prudence on the part of the occupant of the house as a reasonably cautious man would have exercised, if placed in the circumstances that surrounded Mr. Kimball at the time. If there was fault on his part, you will notice that to prevent a recovery, it must appear to have been negligence that proximately contributed to the loss of the house, and this will suggest the inquiry, could the burning of the house have been prevented by the exercise of proper care by Kimball, if such care was not exercised; was the building burned because of the want of such efforts on his part to prevent the burning, as a reasonably prudent man would have made in the same circumstances? These are legitimate matters of inquiry in this connection.

Now, gentlemen, as a summary of what has been said, if you find from the evidence that the fire which destroyed

the planing mill was caused by sparks from the steamer "Oconto," and that this occurred through or by reason of the negligence of the defendant or those in charge of the boat at the time, and that the burning of the planing mill was the proximate cause of the burning of the Crandall house, and that the occupant of the house was not guilty of negligence which proximately contributed to its loss, then the plaintiff is entitled to recover.

If, on the other hand, you find that the fire at the planing mill was not set by sparks from the steamer, or that even though it was so set it did not occur through or by reason of the negligence of the defendant or those in charge of the boat, or if you find that the burning of the planing mill was not the proximate cause of the burning of the Crandall house, or that Kimball, the occupant of the house, was guilty of negligence that contributed proximately to its loss, then your verdict will be for the defendant.

It is admitted that the value of the Crandall building at the time it was burned was $5,846.81 and if you should not find for the plaintiffs your verdict should be for that sum with interest thereon at seven per cent. from the 26th day of August, 1881, which was the time when this action was commenced.

THE METROPOLITAN GRAIN AND STOCK EXCHANGE vs. THE MUTUAL UNION TELEGRAPH COMPANY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MARCH, 1883.

IN EQUITY.

1. PRACTICE—DISSOLUTION OF INJUNCTION.—If an injunction has been issued without notice to the defendant, he may make a motion to dissolve the injunction before filing his answer, and the court will consider the question of continuing the injunction as though it were a motion for an injunction where the defendant has notice and both parties are heard.

2. BOARD OF TRADE—MARKET REPORTS.—The Chicago Board of Trade is a private corporation, and is under no public duty or obligation to admit persons or telegraph companies not members upon the floor of its exchange, for the purpose of collecting and sending out reports of the market as the same is developed by transactions between its members.

3. TELEGRAPH COMPANIES NOT BOUND TO FURNISH MARKET REPORTS.—It is no part of the corporate duty or business of a telegraph company to collect and send out market reports, and though it voluntarily contracts to furnish such information, it may terminate such contract, and it cannot be compelled to enter into another.

Lyman Trumbull and *Leonard Swett*, for complainant.

Lawrence, Campbell & Lawrence and *Williams & Thompson*, for defendants.

BLODGETT, J.—The bill in this case was originally filed in the Circuit Court of Cook county, on the 30th of December last, praying an injunction restraining the defendant, the Mutual Union Telegraph Company, from breaking the connection

of its wires and instruments on the floor of the Exchange room of the Board of Trade with the telegraphic instrument in the complainant's office, and that the Board of Trade be enjoined and restrained from in any manner interfering with the sending by the Telegraph Company, by means of its wires and instruments to complainant's office of reports of the prices of commodities and transactions on the Board of Trade.

An *ex parte* order was made by one of the judges of the Circuit Court, directing the issue of a writ of injunction according to the prayer of the bill.

The case was subsequently removed to this court, where the record was filed on the 9th of February last, and a motion is now made for a dissolution of the injunction so granted by the State Court.

On hearing of this motion it was objected that the defendants' answers, not being under their respective corporate seals, and not being verified by the oath of a proper officer of the respective defendants, the court could not entertain this motion. The seal of the Board of Trade was attached to its answer at the hearing, and since the hearing, by leave of court, the answer of the telegraph company has been withdrawn from the files and its seal affixed, so that this objection may be considered as obviated by what has been done since it was stated.

I was however disposed to treat the case as not coming within the rule urged, for the reason that the injunction was granted without notice to the defendants, and I understand that the practice, both in the State Court and this court, is to allow a defendant who has been enjoined by an *ex parte* injunction, to move its dissolution at once, without requiring him to put in an answer as a condition upon which such motion will be heard. In other words it seems to me the court should consider the question as to the further continuance of this injunction, in the same way it would con-

sider and act upon a motion for injunction when the defendant has notice and both parties are heard.

The bill in this case waives the answer under oath, and for the purposes of the case is a mere pleading. Complainant has waived the right which is given a complainant in a court of equity, to search the consciences of the defendants as to the facts on which it claims relief, and it may well be doubted whether the old rules formulated before the practice of waiving defendant's answer under oath was adopted, are to be as strictly enforced as formerly.

Being of opinion, therefore, that the motion to dissolve, in the present condition of the record, should be entertained, I proceed to consider it briefly on its merits.

The Chicago Board of Trade is an organization or guild of persons dealing mainly in the agricultural products of the West and Northwest, which find a market in the city of Chicago. The board is a corporate body, acting under a charter granted it by the Legislature of the state of Illinois. It does not, and is not by its powers, authorized to deal in any kind of commodities, but it has provided a large exchange room, fitted up with suitable accommodations where its members meet at stated times, and buy and sell among themselves. Among the accommodations thus provided by the board for the use of its members, and paid for out of the annual dues, or assessments on its members or from other income belonging to the board, are reports of the markets in most of the important commercial centers of the world; and it is presumable that most of the dealings in this exchange room, between members of the board are, to some extent at least, influenced by these market reports. The Mutual Union Telegraph Company owns and operates telegraph lines between Chicago and New York as well as several other important cities. For some time past this telegraph company has had wires running into this exchange room, and kept instruments, operators, and

reporters there to gather and report the ruling market prices as they were from time to time shown during the daily sessions by transactions between members of the board dealing there. The telegraph company also had a wire running from this exchange room to a Morse instrument in complainant's place of business, and has for upwards of a year sent over its wires to complainant's office reports of the opening prices and all changes of the prices during the daily session of the board for the leading commodities dealt in there.

And complainant's business has been, and is, to deal to some extent at least, with persons frequenting its office in the same class of commodities as are dealt in by members of the Board of Trade. Complainant, while it has had these reports of prices on the board, from the telegraph company, has paid therefor at the rate of $25 per week, and avers its willingness and ability to continue to pay therefor whatever price shall be required.

It further appears that sometime in December last the Board of Trade notified the telegraph company that it should not allow the operators and reporters of the telegraph company, after the 1st of January, to attend the daily sessions of its members in the exchange room and send reports therefrom to complainant and other persons transacting business upon the same methods and system as complainant.

The telegraph company notified the complainant of the action of the Board of Trade in the premises, whereupon complainant filed the bill now before the court and obtained the injunction as stated.

The Board of Trade contends:

First—That it has the right to exclude persons from the floor of its exchange who come there for the purpose of collecting and sending out reports of the market as the same is developed by transactions between its members; that it is under no obligations to allow the agents of the telegraph company

to attend upon the exchange for the purpose of collecting and reporting prices therefrom.

Second—That the complainant uses the market reports so obtained through the agency of the telegraph company, mainly, if not wholly, for the purpose of making or encouraging others to make gambling contracts as to the rise or fall in the price of commodities dealt in on the board.

While the telegraph company insists that it has no right to keep its reporters, operators, wires and instruments upon the floor of the exchange, except by permission of the Board of Trade, and that when it was notified that it must desist from supplying complainant with its reports, it had no other course to adopt, but to notify complainants that its reports would be stopped. It also insists that it is no part of its corporate duties or business to collect and send these market reports, and that it is under no obligations to complainant or the public to do this kind of work, except at its volition.

The material question, as it seems to me, is whether the Board of Trade is obliged to allow reporters of the telegraph company on the floor of its exchange for the purposes of collecting and transmitting reports of the markets therefrom.

Complainant insists that the public have a right to the information afforded by these market reports, and that because these two defendants are corporations, the Board of Trade is obliged to allow reporters on its floor, and the telegraph company is obliged to transmit such reports to whoever requires them, and is willing to pay for them.

The Board of Trade is a private corporation. It exercises no franchise which clothes it with any of the duties of a public corporation; it has no power of eminent domain, and no such duties are charged upon it toward the public, as have heretofore been held by the courts to characterize or distin-

guish a public from a private corporation. It is only an association of merchants dealing in the products of the country, who solely for their own convenience, provide a room where they meet to transact business. They have a right to exclude all other persons from the meetings of the board, or to admit only such as they choose. If out of compliment they give one person a ticket to their floors, it furnishes no reason why they should issue a similar ticket to another, any more than because one of its members invites a guest to dine at his house, the whole public have the same right to the same invitation.

As the proof shows, the board at great expense, secures for the use of its own members reports of the market rates in other parts of the world. The claim of complainant, if allowed, would make these reports public property, and give the persons not members of the board, and who perhaps never could attain the position of membership of this body, all the advantages of membership. That is to say, if a person who has been expelled from this body for violation of its rules and regulations, can thus compel the Board of Trade to allow the telegraph company to send to his office in this city or elsewhere, reports of transactions on the board, he has all the benefits of a membership from which he has been excluded by perhaps his own misconduct. It is absurd to say that information thus obtained for private use becomes public property, merely because it is collected and paid for through the agency of a private corporation. Transactions on the board are public only so far as the board or its members see fit to make them so. Undoubtedly the members of the board who act as agents, brokers or factors for others, can be compelled by their principals to disclose prices to them, but not to the public. It is only those acting on the board for others, their principals, who can be required to make disclosures of their transactions, and then not to the public, but

only to those for whom they are acting. Members of this board can go on change and deal with each other privately, and are not compelled to let the public know the prices at which they deal. The mere fact that they have been in the habit of informing the public of prices, is no evidence they are obliged to do so, if they do not see fit to do it. In fact, we often see as a matter of common knowledge and information, quotations made of large transactions between different dealers on the board in commodities, at prices not made public, thereby showing clearly that they exercise their own option, of withholding from the public, information as to their prices.

The proof shows that the telegraph company has been permitted by the board to have its reporters, operators, and instruments upon the floor of the exchange, for the purpose of obtaining and sending out information as to prices, but as the telegraph company enjoyed this privilege only at the will and sufferance of the board, there can be no doubt of the power of the board to close its doors against the employés of the telegraph company whenever it sees fit to do so; and it necessarily follows that when the board excludes the telegraph company from the exchange, the company must cease to send reports of prices to complainant. In other words, the arrangement by which complainant got the reports being at the sufferance of the board, the telegraph company can send them only by permission of the board. The telegraphic instrument in complainant's office, and the wires by which it is connected with the main line can no longer be used for the purpose for which they were placed there, and therefore it can not harm complainant to have them removed.

The further reason which was urged in behalf of the telegraph company, that it is no part of the duty of the telegraph company to collect and transmit information, seems to me cogent and forcible. If they volunteer to follow that class

of employment they are bound, perhaps, to do it with fidelity, while their contract continues, but whenever they terminate their contract, no person can compel them to enter into another, or to continue it when they wish it terminated. The defendant gave the complainant due and ample notice of more than a week of its intention to withdraw its reports, and therefore terminated its contract with the plaintiff, which, it seems to me, it had the right and power to do, and I do not know of any power which can enforce or compel the telegraph company to gather news and transmit it when it ceases voluntarily to enter upon and continue in that class of business. If the telegraph company has assumed any contract obligations to the complainant which it is unable or unwilling longer to fulfill, complainant has an ample remedy at law for the damages sustained.

The view I take of the rights of the Board of Trade in the premises makes it unnecessary to consider the second point made by the defense, namely, that complainant uses the reports for gambling purposes. The injunction will be dissolved.

MUTUAL UNION TELEGRAPH COMPANY vs. CITY OF CHICAGO *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MARCH, 1883.

IN EQUITY.

1. TELEGRAPH LINES—RIGHT OF MAYOR OF CITY TO CUT—MUNICIPAL CORPORATIONS.—Where a telegraph company erects poles and strings wires thereon within the limits of a city under the authority of an ordinance of the city council, wherein it is provided that the line of poles and wires shall be of a temporary character only, and that all rights and privileges granted by the ordinance shall expire on a certain day named therein, the mayor of the city has no right of his own motion to proceed to cut and remove the wires after the expiration of the time limited in the ordinance, and he is liable as a trespasser if he does so.

2. INJUNCTION WILL NOT BE GRANTED TO ALLOW WIRES TO BE REPLACED.—But in such case if the mayor has actually gone on and cut and removed the wires an injunction will not be granted to restrain the city authorities from interfering with the company in replacing such wires, because under the ordinance it has no right to maintain them.

3. CITY CAN REGULATE CONSTRUCTION OF TELEGRAPH LINES.—A city has the right to determine in what manner and upon what conditions a telegraph company may enter the city and pass through it.

4. RIGHT OF CITY TO REMOVE TELEGRAPH POLES AND WIRES.—It is competent for the authorities of a city, unless it is bound by an absolute contract permitting telegraph poles and wires to stand where they are, to take reasonable measures to have the same removed.

Lyman Trumbull, for, complainant.

Francis Adams, corporation counsel, and *Julius S. Grinnell*, city attorney, for defendants.

DRUMMOND, J.—The plaintiff is a corporation of the state of New York, and being desirous of establishing a telegraph

line in Chicago, made application to the city council for permission to establish such line, and on December 29, 1881, an ordinance was passed for that purpose, giving the company the right to erect poles and place wires upon them for telegraph purposes in the manner therein described. But the sixth section of the ordinance declared "that the line of telegraph poles erected, and the wires strung under the provisions of this ordinance, shall be of a temporary character only, and for the purpose of enabling the said Mutual Union Telegraph Company to do business while it is perfecting a system of underground telegraph; and due diligence shall be used to perfect and put in operation said system on or before the first day of March, A. D., 1883, and all the rights and privileges granted under this ordinance shall terminate on the first day of March, 1883, and constructions thereunder be removed at the expense and cost of said company, its successors or assigns." The ordinance further provided that before the company should have the right to "erect the said temporary line of poles and string wires," it should execute to the city a bond with proper sureties to be approved by the mayor, in the penal sum of $25,000, the condition of which bond was prescribed by the ordinance; and accordingly a bond with sufficient sureties was in January, 1882, executed to the city with the condition prescribed. The condition required "that the company should pay all the damages caused to the city, or to any person or property by the erection of the line or removal thereof, and that the company should at all times save and keep the city harmless from all damages, loss or expense caused by the erection of the poles and the placing the wires thereon, by the maintenance of the same and the removal thereof, and that the company should take down and remove the poles and wires at the time designated in the ordinance, or sooner if ordered and directed by the mayor, and should pay or cause to be paid all expense, cost or damage

that the city might be put to or sustain in removing or taking down the poles or wires in case the company should fail or neglect to remove them at the time designated, or upon the order and direction of the mayor. A further condition was that the company should at all times comply with the ordinance and with the provisions thereof, and with the direction or orders of the mayor or commissioner of public works in regard to the erection, maintenance, or removal of the same. The defendant Harrison who is the mayor of the city, assuming that he had the right under the ordinance after the first of March to cut and remove the wires from the telegraph poles used by the plaintiff, directed it to be done, and they were accordingly severed and the company prevented from using them for telegraphic purposes. After this had been done, the company on the fifth of March filed a bill in this court alleging the destruction of the wires by the defendant, and declaring that it had, in good faith, made experiments to perfect a system of underground telegraphing before the first day of March, and expended large sums for that purpose, which had not been successfully accomplished, and that it could not, therefore, transmit telegraphic dispatches otherwise than upon the wires placed upon the poles before that time used by the company. The bill prays that the defendants may be restrained from further cutting, interrupting, or removing any of the wires or poles of the plaintiff, and from interfering with the plaintiff in reconnecting, maintaining, repairing, and operating the same; or that the defendants may be restrained from doing any of the acts complained of until such time as by the exercise of due diligence a practical method of underground telegraphy could be devised and put in operation.

It appears that the defendants have not done anything to the poles or wires of the plaintiff since the bill was filed, of which any complaint is now made. No notice was given to

the plaintiff, before the acts done by the defendant, which requested the removal of the poles or wires, nor was any notice given of the intentions of the mayor. He seems to have acted of his own motion, and without any express direction from the city council. It should also be stated that there is an allegation in the bill that in June, 1881, the plaintiff, by an arrangement with the Chicago & Milwaukee Telegraph Company, obtained the right to string and maintain upon the poles of that company telegraphic wires, but there is no statement in the bill of the authority under which that company had erected poles or placed telegraphic wires upon them. There is a statement that the plaintiff has accepted the provisions of the act of Congress of July 24, 1866, but the date of the acceptance is not mentioned. When the motion for an injunction was argued, a day or two since, the court intimated that the mayor had not the right to cut and remove the wires in the manner stated, and without notice to the plaintiff, and also expressed a doubt whether the acts complained of being past, it could, under the facts of the case, by way of injunction, enable the plaintiff to replace the wires for the purpose of resuming telegraphic operations in the city. The counsel of the parties, since the argument, have furnished briefs and also cited authorities upon these two points, the principal one being whether the plaintiff can be permitted to put itself in the position it was before the acts complained of were performed by the mayor. What may be said by the court must be understood as limited to the rights of the parties under the ordinance already referred to and their acts connected therewith. If the plaintiff has other rights by contracts with other telegraphic companies, they must stand upon the authority of those companies to confer such rights.

On further consideration, I am not disposed to change the opinion heretofore expressed as to the right of the mayor to

cut and remove the telegraph wires. The right existed either by virtue of his authority as executive officer of the city, or by virtue of the ordinance. The rights of the plaintiff exist only under the ordinance, but it is thought that the mayor derived authority in some way from the bond executed by the plaintiff. The terms of the ordinance as to the plaintiff's rights and those of the condition of the bond are not in entire harmony, and, although in the latter, power is apparently given to the mayor to terminate the contract before the first of March, yet there can be no doubt that on a non-compliance with that condition the only effect of it would be the right, perhaps, to bring a suit upon the bond. It did not clothe the mayor with authority of his own motion to destroy the property of the plaintiff. Because a contract of lease is terminated by efflux of time the lessor has no right to dispossess the lessee by violence and destroy his property If, by the terms of the ordinance authority had been expressly given to the city to remove the poles and wires of the plaintiff after the first of March, that might have operated by way of estoppel upon the telegraph company. But no such power is contained in the ordinance, nor is it fairly to be inferred from the condition of the bond, nor did the power exist by virtue of the official position of the mayor. The fact that there was an ordinance in force to prevent the construction of more telegraphic lines does not change the principle. The mayor can only execute the law when properly authorized. He cannot expound the contracts made by the city, claim they have been violated, and by his own act and will, and without the authority of a court of law or equity, enforce the penalty of their supposed violation. The wires had been placed on the telegraph poles by contract with or license from the city; they were, therefore, there in pursuance of law. It was not as if telegraph poles had been erected and wires attached in violation of law, and therefore

it was not like the case of the wooden house constructed within the limits of the city, which the Supreme Court of this state held could be removed of their own will by the city authorities. *King vs. Davenport*, 98 Ill. 305.

It is admitted that nothing has been done by the defendants, nor, perhaps, even threatened, since the bill was filed. If there were, there can be no doubt that the court would have the power to put a stop to any such action.

The next question to be considered is whether, if the plaintiff should proceed to replace the wires, or desire so to do, the court shall restrain the defendants from interference with such action by the plaintiff. That would be in the nature of affirmative relief by mere operation of the writ of injunction; and in this case the only effect of it would be to enable the plaintiff to do an act after the authority under which it is to be performed no longer exists. For, as has been already stated, the true construction of the ordinance seems to imply that whatever the result of the experiment for underground telegraphy may have been, the rights of the plaintiff, under the ordinance, terminated on the first day of March. What might be the effect of the termination of the contract upon the property of the plaintiff was an after matter, to be determined, in case of controversy, by some competent tribunal. In this respect this is not like the cases cited by the plaintiff's counsel.

It is insisted by him that several cases have been decided which sustain the principle contended for, viz: that it is the duty of the court, in this case, to prevent the defendants from interfering with the plaintiff in replacing the wires which have been cut. *The Atlantic & Pacific Tel. Co. vs. Union Pacific Railway Co.*, 1 McCrary, 541, cited in support of this doctrine, states in the head-note that, although a contract by a corporation may have been

ultra vires, yet a court of equity will restrain a party from recovering possession of property which has passed under the contract, except by due process of law, and by the return of the consideration paid, and the case sustains that statement. The opinion of the court states the prayer of the bill, a part of which was that the defendant should be restrained from preventing the plaintiff from reconnecting the wires so as to restore them to their original condition before the same were severed, and it says a preliminary injunction was granted upon the bill, but to what extent and in what particulars does not appear. The court, in the conclusion of the case, stated that the injunction granted would be so far modified as to make it clear that the railroad company, a party to the contract, was at liberty to institute legal proceedings to cancel and set aside the contract upon the return of the consideration, and to settle, upon the principles of equity, the accounts as between the parties.

In *Western Union Tel. Co. vs. St. Joseph & W. R'y Co.*, 1 McCrary, 565, the prayer of the bill was, among other things, for the same relief as in the case just cited, and the court concludes its opinion by saying that the defendants would be enjoined from attempting to eject the plaintiff or to seize the property.

In the case of *American Union Tel. Co. vs. Union Pacific R'y Co.*, 1 McCrary, 188, where the court admitted that one of the companies had the right to rescind the contract, it declared that it did not justify the taking possession, except by lawful means, and the court concluded its opinion by saying that the injunction granted would be so far modified as to make it clear that the railroad company was at liberty to institute legal proceedings, the same as in the case of *Atlantic & Pacific Tel. Co.*, already referred to.

In the case of *Cole Silver Mining Co. vs. Virginia &*

Gold Hill Water Co., 1 Sawy. 470, where an unlawful act was done by the defendants in relation to water-power, the court held that the injunction would issue, although it should be necessary for the defendants to fill up or build a water tight barrier across the tunnel to accomplish the end sought; that is to say, what the defendants had done was in violation of the rights of the plaintiff, although it might require time, labor, and the expenditure of money to accomplish that purpose.

In the case of the *Western Union Tel. Co. vs. Kansas & Pacific R'y Co.*, decided by the district judge of Colorado, there is a statement by the court that the parties must be restored to the possession in which they were before the wrongful acts done by the defendant, and for that purpose the court says: "The injunction will be allowed." It was, in fact, according to the view of the court, because the property was owned by the parties to the contract jointly, and the defendant had wrested the possession from its associate without warrant or authority of law.

I do not see in any of those cases, other than in that last cited, a distinct statement that the court would issue an injunction for the purpose of preventing the defendant from interfering with the plaintiff in the replacing of the wires cut, although the fact may have been that the injunction was issued. But, suppose that to be so, I do not think that any of these cases are like that before this court. The grounds upon which the injunction issued in those cases, if it did issue, was because there were certain rights existing on the part of the plaintiff, independent of what grew out of the wrongful act, although the adjudication of those rights in one sense might be made because of the wrongful act done. Now, in this case there is nothing of the sort. What is the obligation of the city to the complainant in this case? The rights of the plaintiff have terminated by the efflux of time, as

the court has already decided. There is no right and no obligation,—no right on the part of the plaintiff, and no obligation on the part of the defendants, except what springs from the acts done by the mayor in the cutting of the wires, which, according to the view of the court, was technically a trespass for which he would be responsible. There has been no consideration paid by the plaintiff to the city, as in the cases cited. It was merely a license on the part of the city to the plaintiff temporarily to erect poles and string wires for telegraphic purposes.

Then, again, this is a case between an ordinary corporation on one side, and a municipal public corporation on the other. A great city, notwithstanding telegraphic lines may be an instrument of commerce, has the right, as I believe, to determine how, in what manner, and upon what condition a telegraph company shall enter the city and pass through it for the purpose of allowing the citizens of the country to communicate by telegraph, one with another. A railroad is a great instrument of commerce, and yet there can be no doubt that the city of Chicago has the right to prescribe the terms upon which a railroad shall come into and pass through the city, how cars shall be run, with what degree of speed, etc. These are all matters subject to the control of the city. Even were it true that this were a telegraph company clothed with all the rights given by the act of Congress, the power of the city would, probably, still exist, the same as with a railroad company or an ordinary telegraph company not acting under the authority of Congress, to regulate and control it.

While I have stated that the act of the mayor was unauthorized, I do not wish to be understood as declaring that if proper notice had been given to the telegraph company, after the first of March, to remove its wires, and to cease to act under the ordinance, and it did not comply with the terms

of the ordinance, or the conditions named in the bond, and the mayor had been authorized by the city council to act as he has done, that would have certainly been an unlawful act.

I can have no doubt it is entirely competent for the city authorities, unless they are bound by some absolute contract permitting the poles and wires to stand as they are, to have them removed and put an end to such unsightly obstructions as these poles and wires are now in our streets. There must be a power, I think, somewhere, to cause them to be removed, and to regulate and control the manner in which telegraph lines shall enter or pass through the city.

I can see no object in the court issuing an injunction to prevent the city authorities from interfering with the plaintiff in replacing the wires, because, as I have said, it would enable them to do what I think they have no right to do under the ordinance. But, while I say this, I cannot lose sight of some portions of the evidence in this case. For example, by the ordinance itself, the city has the right to string fire-alarm wires upon the poles erected by the plaintiff, and to use them for that purpose, and so uses them notwithstanding the mayor has removed the wires of the plaintiff from the poles. Now why, so long as these poles stand and are used for this purpose, the plaintiff cannot be permitted also to string its wires upon these poles, is something I cannot comprehend. It seems to be an unfair discrimination against the plaintiff in the operation of its telegraph lines. Other telegraph companies are using similar poles, and with wires strung upon them, and I do not see why, until the city adopts some decided policy in relation to poles and wires, which are now existing in our streets, the plaintiff cannot be permitted to use these poles as long as they stand for other purposes. If they stand for fire-alarms, why cannot they stand for the purpose of communicating by telegraph between different persons in and out of the city?

I would say in conclusion that I agree that if there has anything been done which constitutes an irreparable wrong to the plaintiff, which can only be protected by a bill in equity, then the court might feel inclined to issue an injunction; but all that has been done, according to the view of the court, is an act of trespass; that has been done improperly, illegally, as I think, which could be done lawfully. The court has stated that it only decides as to the rights of the plaintiff under the ordinance, and the action connected therewith. It is alleged in the bill, as I have already said, that wires have been put up by the plaintiff upon the poles of the Chicago & Milwaukee Telegraph Company. If there were proper allegations in the bill in relation to the rights of the Chicago & Milwaukee Telegraph Company in the city, then I think the principles which I have stated would not apply, because I am not prepared to say but that if the Chicago & Milwaukee Company has the right to erect its poles and to place wires upon them, that it could not give that permission to the plaintiff; but there are no allegations in the bill upon the subject, except the fact is shown that the poles are erected. How, or why, or under what authority, does not appear.

OBADIAH HUSE *et al.* vs. JOSEPH O. GLOVER *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—MARCH, 1883.

IN EQUITY.

1. NAVIGATION—RIGHT OF STATE TO CONSTRUCT LOCKS AND DAMS.—The state of Illinois, in the absence of Congressional legislation upon the subject, can improve the navigable waters within its limits in the manner and to the extent it may see fit; and in so doing can construct locks and dams upon the Illinois river.

2. CONSTRUCTION OF ORDINANCE OF 1787.—The ordinance of 1787 for the government of the Northwestern Territory, providing that the navigable streams leading into the Mississippi river shall be common highways and be forever free to the inhabitants of the territory and the citizens of the United States, does not restrict the right of states formed out of such territory to put improvements in the rivers within their bounds.

3. CONSTITUTIONAL LAW—COLLECTION OF TOLLS BY STATE.—If a state has constructed locks and dams upon a navigable river for the improvement of navigation it may lawfully charge tolls for the passage and use of the docks, based upon the tonnage measurement of the boats and their cargoes, without conflicting with the clause in the Federal Constitution, which forbids a state, without the consent of Congress, from laying any duty of tonnage.

Palmer, Robinson & Shutt and *G. S. Eldredge*, for complainants.

Edsall & Hawley and *Lawrence, Campbell & Lawrence*, for defendants.

HARLAN, J.—This is a suit in equity. The present hearing is upon demurrer to the bill.

The complainants, constituting the firm of Huse, Loomis & Co., are, and since 1864 (besides a general transportation

business) have been, largely engaged in cutting ice at Peru and other points on the Illinois river, and in transporting the same on that river, thence by the Mississippi and other navigable streams, to markets in different states. In the conduct of their business they have employed from three to six steamboats and from thirty to sixty barges, all duly registered and licensed in accordance with the laws of the United States.

The defendants are canal commissioners appointed in pursuance of certain statutes of Illinois, which provided among other things, for the construction of locks and dams on the Illinois river at Henry and Copperas creek. The former were completed in 1872 and the latter in 1877, at an aggregate cost of about $854,739.42, the whole of which was paid by this state except about the sum of $62,359 paid by the United States.

By the statutes referred to, the commissioners were authorized to establish and collect reasonable tolls for the passage and use of the locks by boats. To that end a schedule was adopted, in accordance with which complainants have been required to pay and have paid, always under protest, tolls for the passage of the locks by their boats, such tolls being ascertained as to amount, upon the basis of the tonnage measurement of the boats and their cargoes.

From the construction of the lock at Henry, in 1872, up to the spring of 1874, complainants paid to the canal commissioners, for the passage of that lock, in tolls or charges, nearly $3,000 upon the tonnage measurement of their boats, and about $5,000 upon their cargoes of ice in ice-barges towed by such boats. Their average shipments each subsequent year have been quite as large, and upon such shipment tolls have been exacted, and paid by them.

The prayer of the bill is that the defendants, their agents, servants, and employés, be restrained from imposing and

exacting from complainants any tolls or other charges for the right of passage through said locks by their steamboats, ice-barges, and other vessels used in the transaction of their business on the Illinois river.

The substantial grounds upon which complainants proceed are, briefly stated, these:

That the locks and dams so constructed by the state not only do not aid or promote their business, but are practical impediments in the way of its prosecution and to the free navigation of the Illinois river by their boats.

That their construction and the imposition by the canal commissioners of tonnage duties, under the name of tolls, upon the boats and cargoes of complainants are in violation: *first*, of that part of the ordinance for the government of the Northwestern Territory, which provides that the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of said territory as to the citizens of the United States and those of any other states that may be admitted into the confederacy, without any tax, impost, or duty therefor; *second*, of section 10, article 2, of the National Constitution, which prohibits any state, without the consent of Congress, from laying any duty of tonnage; and, *third*, of section 8, article 1, of the Constitution, which invests Congress with power to regulate commerce with foreign nations, and among the several states and with the Indian tribes.

It seems to the court that most of the questions discussed by counsel are concluded—some directly, others substantially—by the adjudged cases.

In *Wilson vs. The Black Bird Creek Marsh Co.*, 2 Peters, 245, the question was whether the Legislature of Delaware could, consistently with the National Constitution, authorize a dam to be constructed across Black Bird Creek, in that

state. That stream, although wholly within the limits of Delaware, was conceded to be a public navigable highway in which the tide ebbed and flowed, and was capable of being used, and therefore had been used, by sloops and other vessels enrolled and licensed under the laws of the United States.

After stating that the value of the property on the banks of the creek was enhanced by excluding the water from the marsh; that the health of the inhabitants in that vicinity was thereby probably improved, and that measures calculated to effect such results were within the reserved powers of the state so long as they did not come in collision with the powers of the General Government, the court, speaking by Chief Justice MARSHALL, said: "But the measure authorized by this act stops a navigable creek, and must be supposed to abridge the rights of those who have been accustomed to use it. But this abridgment, unless it comes in conflict with the Constitution or a law of the United States, is an affair between the government of Delaware and its citizens, of which this court can take no cognizance. The counsel for plaintiffs in error insist that it comes in conflict with the power of the United States 'to regulate commerce with foreign nations and among the several states.' If Congress had passed any act which bore upon the case; any act in execution of the power to regulate commerce, the object of which was to control state legislation over those small navigable creeks into which the tide flows, and which abound throughout the lower country of the Middle and Southern states, we should feel not much difficulty in saying that a state law coming in conflict with such act would be void. But Congress has passed no such act. The repugnance of the law of Delaware to the Constitution is placed entirely on its repugnancy to the power to regulate commerce with foreign nations and among the several states; a power which has not

been so exercised as to affect the question. We do not think that the act empowering the Black Bird Creek Marsh Company to place a dam across the creek can, under all the circumstances of the case, be considered as repugnant to the power to regulate commerce in its dormant state, or as being in conflict with any law passed on the subject."

In *Gilman vs. Philadelphia*, 3 Wall. 713, the Supreme Court sustained the constitutional validity of an act of the Legislature of Pennsylvania which authorized the construction of a bridge across the Schuylkill, one of the navigable waters of the United States, although the effect of that structure was not only to seriously impair the value of wharf property above the contemplated bridge, but to prevent the navigation of the river by certain vessels theretofore accustomed to use such wharves. While recognizing, to the fullest extent, the power of Congress to control, in the interest of commerce, the navigable waters of the United States, so as to keep them free of all obstructions, whether interposed by the states or by private persons, the Supreme Court—affirming the doctrines of *Cooley vs. Wardens*, 12 How. 299—said that there were some subjects connected with commerce which called for uniform rules and national legislation, while others were best regulated by rules and provisions suggested by the varying circumstances of localities, and to be enforced under the authority of the states, so long as Congress did not act. Speaking by Mr. Justice SWAYNE, the court further said: "It must not be forgotten that bridges which are connecting parts of turnpikes, streets, and railroads, are means of commercial transportation, as well as navigable waters, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs. It is for the municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made sub-

servient to the other. The states have always exercised this power, and, from the nature and objects of the two systems of government, they must always continue to exercise it, subject, however, in all cases, to the paramount authority of Congress, whenever the power of the states shall be exerted within the sphere of the commercial power which belongs to the nation." The opinion in that case concludes with these words: "The river, being wholly within her limits, we cannot say that the state has exceeded the bounds of her authority. Until the dormant power of the Constitution is awakened and made effective, by appropriate legislation, the reserved power of the states is plenary, and its exercise in good faith cannot be made the subject of review by this court."

In *Railway Company vs. Fuller*, 17 Wall. 569, in illustration of these doctrines, it was said: "Where a stream, navigable for the purposes of foreign or inter-state commerce, is obstructed by the authority of a state, such exercise or authority may be valid until Congress shall see fit to intervene. The authority of Congress in such cases is paramount and absolute, and it may compel the abatement of the obstruction whenever it shall deem it proper to do so."

In *Pound vs. Turk*, 95 U. S. 462, the Supreme Court sustained the validity of a statute of Wisconsin which authorized the construction of a dam across a navigable river wholly within its limits. After referring to the fact that there were navigable streams in many of the states whose greatest value in water carriage is as outlets to saw logs, sawed lumber, coal, salt, etc., the court, speaking by Mr. Justice MILLER said: "In order to develop their greatest utility in that regard, it is often essential that such structures as dams, booms, piers, etc., should be used, which are substantial obstructions to general navigation, and more or less so to rafts and barges. But to the Legislature of the state

may be most appropriately conferred the authority to authorize these structures, when their use will do more good than harm, and to impose such regulations and limitations in their construction and use as will best reconcile and accommodate the interests of all concerned in the matter. And since the doctrine we have deduced from the cases recognizes the right of Congress to interfere and control the matter whenever it may deem it necessary to do so, the exercise of this limited power may all the more safely be confided to the local Legislatures."

In *Transportation Co. vs. Chicago*, 99 U. S. 635, the court, through Mr. Justice STRONG, said: "It has long been held that navigable rivers wholly within a state are not outside of state jurisdiction so long as Congress does not interfere."

In addition to these decisions in the Supreme Court of the United States, reference is made to *Heerman vs. Beef Slough*, etc., 8 Biss. 334; *U. S. vs. Beef Slough Man. Co.*, Id. 424, and *U. S. vs. New Bedford Bridge*, 1 W. & M. 401.

The doctrines of the adjudged cases sustain the authority of this state,—there being no act of Congress forbidding it —to construct locks and dams upon the Illinois river. Her avowed object in so doing was to improve navigation of that river and effect a reduction of freights to the headwaters of Lake Michigan and to the Mississippi river. The mode and extent of such improvement, in the absence of national legislation based upon the power of Congress to regulate commerce, was for her determination. Her discretion, in such matters, is not to be controlled by the courts so long as Congress does not interfere. That locks and dams cause some delay to, or in some degree affect the interests of those whose business on the Illinois river does not absolutely require the use of such instrumentalities, may be conceded. But if, in

the judgment of the state, which has jurisdiction over all persons and things within its limits except as restrained by the National Constitution, the system of locks and dams is more advantageous to the general public than the river in its natural condition; if she deems it important to improve the navigation of the Illinois river, although thereby certain classes engaged in commerce may be subjected to inconveniences which do not exist in the use of the river in its unimproved or natural condition, her determination in the premises is not to be questioned by any authority except Congress.

Until the National Legislature interposes its paramount authority, the state cannot be controlled by the judiciary as to the mode and extent of improving the navigable streams within her limits.

Nor do we perceive that the power of the state in this respect is in any degree affected by the ordinance of 1787, even if that ordinance as to the matters now under consideration be not superseded by the Constitution of the United States.[1] Illinois entered the Union upon terms of equality in all respects with the states which existed at the time the Constitution was formed. In the statute of Virginia, authorizing the cession to the United States of the territory northwest of the Ohio river, and in the deed of cession, one of the conditions prescribed was that the states formed out of that territory should be admitted "members of the Federal Union, having the same rights of sovereignty, freedom and independence as the other states." The ordinance itself provided for the admission of the new states "on an equal footing with the original states, in all respects whatever." So that, it seems to the court, Illinois has as full power and jurisdiction over her navigable streams as Virginia has

[1] *Strader vs. Graham*, 10 How. 94; *Permoli vs. Municipality, etc.*, 8 Id. 589; *Pollard's Lessee vs. Hagan*, 3 Id. 224; *Woodman vs. Kilburn*, 1 Biss. 546; *Columbus Ins. Co. vs. Curtenius*, 6 McLean, 209.

over the navigable streams within her limits. But if her powers in that respect are in any degree affected or controlled as to their exercise by the ordinance of 1787, it is not perceived that the position of complainants can be maintained. The recognition of the right of the state, when unrestrained by acts of Congress, to improve navigable streams within her borders in such manner and to such extent as to her seems conducive to the public interests, is not necessarily inconsistent with the provisions of that ordinance. The declaration therein that the navigable streams leading into the Mississippi river shall be common highways, and be forever free to the inhabitants of the territory and to the citizens of all the states, was certainly not intended as an inhibition upon the improvement of such highways by the Federal Government or by the respective states formed out of the Northwest Territory. We cannot suppose that Virginia intended, when ceding this vast domain, to withhold from the future states to be erected therein that control of navigable streams which, upon the adoption of the Constitution, she would have over those within her own limits. The utmost, perhaps, which can be claimed is that that provision was intended to secure the use of such navigable streams as highways upon terms of equality, that is, without discrimination against inhabitants of that territory or citizens of any of the United States. The Illinois river is none the less a common highway because its navigability has been improved so as to meet the wants of the public in a larger degree than it was capable of doing in its natural state. It is still a common highway, for use alike by all citizens of the United States under regulations which do not seem to be inconsistent with the ordinance of 1787. Besides, in the opinion of the court, the rights secured by the provisions of that ordinance, so far as it relates to navigable streams, are in substance secured by the Constitution of the United States. Conse-

quently, if that which Illinois has done towards the improvement of the Illinois river be not forbidden by the National Constitution, it is not in conflict with the provisions of the ordinance of 1787.

The only remaining question which we deem it necessary to consider relates to the right of the state to charge tolls for the passage and use of these locks, such tolls being based upon the tonnage measurement of the boats and their cargoes. It is contended by complainants that the exaction of these tolls is inconsistent with that clause of the Constitution which prohibits the states, without the consent of Congress, from laying any duty of tonnage. The court is of the opinion that the right of the state to charge for the use of its locks may be placed upon the same ground upon which rests the authority of municipal corporations, owning improved wharves upon the navigable waters of the United States, to charge for the use of such wharves by vessels, even those licensed under the laws of the United States and engaged in commerce with foreign nations or among the several states. Municipal regulations of this character have been maintained even where the wharfage fees are measured by the tonnage of the vessel using the wharves. Such fees, so measured, are not deemed duties of tonnage within the meaning of the Constitution, where they are exacted not for the mere privilege of landing at a wharf, but as fair and reasonable compensation for the use of additional facilities furnished for those engaged in commerce.[1] So in reference to tolls for use of locks constructed on a navigable stream lying wholly within a state. Although measured by the capacity of the vessel or the extent of the cargo, they are not, necessarily, tonnage duties, which the states are prohibited from laying. They are

[1] *Packet Co. vs. St. Louis*, 100 U. S. 429; *Vicksburg vs Tobin*, Id. 430; *Packet Co. vs. Keokuk*, 95 U. S. 80.

not, within the meaning of the Constitution, duties upon the vessel or its cargos, but compensation exacted for the use of improved commercial facilities. In this case it cannot be claimed that the charges exacted by the commissioners are disproportioned to the amount expended by the state in the construction of these locks and dams or that they are, in themselves, unreasonable in amount. Referring to that clause in the ordinance of 1787 which prohibits any tax, impost or duty, upon the right to navigate the navigable waters therein described, Mr. Justice McLean, in *Spooner vs. McConnell*, 1 McLean, 352, said: "The provisions of the ordinance had reference to the navigable rivers and the carrying places as they then were. And in that state they were to remain free, without tax, etc. But this does not prevent the Legislature from improving the navigation of rivers and the carrying places between them. Such improvements can in no sense be considered as repugnant to the ordinance, but in promotion of its great object. And it would seem to be no violation of the compact if the Legislature should exact a toll, not for the navigation of the rivers in their natural state, but for the increased facilities established by the funds of the state."

It is unnecessary to extend this discussion. The court is of opinion, for the reasons given, that the state of Illinois has the same power to improve the navigable waters within her limits that she possesses over other highways; and where money has been expended in making improvements, it is competent for the state to impose tolls for their use, even where the stream is one to which the regulations of commerce may be extended. This statement of the rule is, however, subject always to the qualification that the action of the state, touching navigable streams within her borders, is subordinate to the paramount authority of the nation, whenever and as it may be exercised, under the power granted to

Congress of regulating commerce with foreign nations and among the several states.

Let the demurrer be sustained; and if the complainants do not wish to amend, an order may be rendered dismissing the bill, with costs to defendants.

STATE OF INDIANA *ex rel.* vs. PULLMAN PALACE CAR COMPANY.

CIRCUIT COURT—DISTRICT OF INDIANA—MARCH, 1883.

1. TAXATION—ONE STATE CANNOT TAX MONEY IN ANOTHER STATE.—The state of Indiana cannot tax that portion of the gross receipts of an Illinois corporation in its treasury in Illinois, which was earned in doing business in Indiana. The taxing power cannot be exercised on persons and property beyond the territory or jurisdiction of the state.

2. INTER-STATE COMMERCE—TAXATION BY STATE OF SLEEPING CAR COMPANIES.—The transportation of passengers from one state to another in sleeping cars is interstate commerce and cannot be regulated or taxed by a state.

3. SAME—CONSTITUTIONAL LAW.—Section 87 of the act of the Legislature of Indiana of March 29, 1881, entitled "An act concerning taxation" which provides a two per cent. tax on the gross receipts of every foreign sleeping car company which are earned by doing business within the limits of that state, is unconstitutional and void.

D. P. Baldwin, Attorney General of Indiana, and *Ralph Hill*, for plaintiff.

O. A. Lochrane and *Baker, Hord & Hendricks*, for defendant.

Indiana vs. Pullman Palace Car Co.

GRESHAM, J.—The Legislature of Indiana, on the twenty-ninth day of March, 1881, passed an act entitled "An act concerning taxation," the eighty-seventh section of which reads as follow:

"Every joint-stock association, company, or corporation, incorporated under the laws of any other state, and conveying to, from, and through this state, or any part thereof, passengers and travelers in palace cars, drawing-room cars, sleeping cars, or chair cars, on contract with any railroad company, or the managers, lessee, agent, or receiver thereof, shall be held and deemed to be a sleeping car company; and every such sleeping car company doing business in this state shall annually, between the first day of April and the first day of June, report to the auditor of state, under the oath of an officer or agent of such corporation, the gross amount of all their receipts, within or without the state, for fares earned or business done by such company within this state for the year then next preceding the first day of April of the current year; and in computing such gross receipts the same shall be in the proportion that the distance traversed in this state bears to the whole distance paid for. At the time of making such report, such company shall pay into the treasury of the state the sum of $2 on every $100 of such receipts. And every sleeping car company failing or refusing for more than thirty days after the first of June to render an accurate account of such gross receipts, as above provided, and pay the required tax thereon shall forfeit $25 for each additional day such report and payment shall be delayed, to be recovered in an action in the name of the state of Indiana, on the relation of the auditor of state, in any court of competent jurisdiction, and the attorney general shall conduct such prosecution; and such sleeping car companies so failing or refusing shall be prohibited from carrying on such business until such payment is made; and all railroad companies in

this state, or the persons managing or operating the same, are prohibited from hauling any cars of any sleeping car company while so in default; and for each violation of this prohibition shall be liable to pay to the state of Indiana the sum of $100, to be recovered in the proper action by the state."

The first paragraph of the complaint avers that the defendant, the Pullman Car Company, is a joint-stock company, organized under the laws of Illinois; that it now is and for a long time has been engaged in the business of carrying to, from, and through the state of Indiana passengers and travelers in palace cars, drawing-room cars, sleeping cars, and chair cars; that it failed and refused to report to the auditor of state, as required by law, the gross amount of all its receipts within and without the state, for fares earned or business done by it within the state for the year preceding the first day of April, 1881, computing such gross receipts as required by the above quoted section, and failed and refused to pay into the treasury of the state $2 upon every $100 of such gross receipts, which, from the twenty-ninth day of March, 1881, to the twenty-ninth day of May, 1882, amounted to $200,000. It is averred that, by failing to make the report and pay the taxes due to the state under the statute, the defendant has incurred penalties amounting to $75,000, for which sum judgment is demanded.

The second paragraph avers that for the year ending the thirty-first day of March, 1881, the defendant, while engaged in the business described in the first paragraph, earned and collected for carrying passengers, in Indiana alone, the sum of $156,931.18, and for the year ending the thirty-first day of March, 1882, the further sum of $160,926.52, and that these sums were received within and without the state. Judgment is demanded in this paragraph for a tax of $2 on each $100 of such gross receipts for these two years.

The right of a state to tax property within its territory or jurisdiction, and protected by its laws, cannot be questioned so long as no provision of the Federal Constitution is violated. This right of taxing for the revenue may be exercised in any mode or form that the state sees fit to adopt. Corporations may be taxed by the state whose creatures they are. They may be taxed on their stock, their franchises, their gross receipts, or their net receipts, and they may be taxed upon their receipts as part of their common property or funds in their treasuries, although such receipts have been derived from the business of commerce between the states. But, while the taxing power of the state is thus unlimited over subjects within its jurisdiction, it is, nevertheless, true that this power cannot be exercised on persons and property beyond the state's territory or jurisdiction. *State Tax on Foreign-held Bonds*, 15 Wall. 300.

The defendant is an Illinois joint-stock company, engaged in the business of transporting passengers through the states. Indiana claims the right to tax the gross receipts of this company in its treasury in Illinois, which were earned within this state. Part of these receipts, and no doubt the greater part, were not even collected in Indiana. The mere fact that the money was earned in doing business in Indiana gives the latter state no right to tax it in the treasury of the defendant in Illinois. The taxes and penalties sued for are unauthorized for another reason. The Federal Constitution gives to Congress the "power to regulate commerce with foreign nations and among the several states." This provision was intended to secure the absolute freedom of interstate commerce and communication from all state restrictions, exactions and burdens. By it a state is forbidden to impose any tax upon freight or passengers in transit from state to state, or upon the carrier, for the right or privilege of engaging in such business. The transportation of merchan-

dise and passengers from state to state is inter-state commerce, and the thing which the states are forbidden is the regulation of commerce. It is idle to say that the right to carry passengers from state to state is secured by the commercial clause of the Federal Constitution from state exactions, if a state may declare by its Legislature that this right shall not be exercised within its limits unless it was intended that they should pay for the privilege of transporting passengers through the state.

A state can regulate its internal commerce as it pleases, but no state can exclude from its limits corporations of other states, as carriers of passengers from state to state, nor can any state charge corporations, whether organized by its own laws or the laws of other states, for the privilege of engaging in commerce within its limits. If Indiana may exact two per cent. of the gross earnings of corporations organized under the laws of other states as a condition upon which they will be permitted to pass over its territory as carriers of passengers, of course it may exact more, and other states may make similar exactions. The right asserted in this case amounts to a restraint or regulation of commerce between the states, and its enforcement would render the protection of the Federal Constitution unreal. If the tax is sustained, it is plain that it will ultimately fall upon the passengers, and become a tax upon them for the privilege of crossing the state. By a statute of Nevada it was declared that a capitation tax of one dollar should be levied upon every person leaving the state by railroad, stage-coach, or other vehicle employed in transporting passengers for hire; and the persons then engaged in the transportation of them were required to make monthly reports of the number of passengers carried, and to pay the tax. It was held that this was a tax upon the privilege of being carried out of the state; that a state cannot tax persons passing through or out of it;

and that inter-state transportation of passengers is beyond the reach of state legislation. *Crandall vs. State of Nevada*, 6 Wall. 35.

Commerce between the states, whether carried on by individuals or corporations, is under the regulation of Congress, A state may exclude from its jurisdiction corporations of other states not engaged in inter-state commerce. The right of exclusion cannot be exercised against corporations of other states thus engaged, any more than against individuals. *Paul vs. Virginia*, 8 Wall. 168.

The state of Pennsylvania, by a statute, taxed the gross receipts of railroad, canal, and transportation companies, incorporated under the laws of that state, and the Supreme Court of the United States held that this might be done, on the ground that the states have authority to tax the estate, real and personal, of all corporations of their own creation, including carrying companies, precisely as they may tax similar property when belonging to natural persons, and on the further ground that the receipts when taxed had become part of the general property of the corporation, and were in its treasury within the state. *State tax on Railway Gross Receipts*, 15 Wall. 284. This case is not authority for the plaintiff in the case at bar. An ordinance of the city of Mobile required that every express company or railroad company doing business in that city, and having a business extending beyond that state, should pay an annual license of $500; that every such company doing a business not extending beyond the state, but beyond the city limits, should pay an annual license of $100; and that every such company doing business exclusively within the city should pay an annual license of $50. The penalty prescribed for violating this ordinance was a fine of $50 for each day's non-compliance.

A Georgia corporation established a local office in the city of Mobile, where, by its local agent, it did a general forward-

ing and commission business, extending beyond the state of Alabama. The agent was fined for conducting the business of the agency without having paid the license of $500. The case was finally taken to the Supreme Court of the United States on a writ of error, where, in *Osborne vs. Mobile*, 16 Wall. 479, the validity of the ordinance was sustained. The tax in this case took the form of a license fee for maintaining an agency or local place of business in Mobile, while the tax claimed by Indiana under section 87 of the state tax act is not a license for establishing and maintaining an agency or local place of business in the state, or a tax upon property of the defendant having a situs in the state, but, as already seen, it is a tax upon money in the defendant's treasury in Illinois, because it was earned in transporting passengers across Indiana. This is an effort to give a statute of Indiana extra-territorial force, and to regulate commerce between the states, for both of which reasons section 87 is inoperative and void. See also, *Indiana vs. American Express Co.*, 7 Biss. 227.

Demurrer sustained.

PUBLIC GRAIN AND STOCK EXCHANGE vs. WESTERN UNION TELEGRAPH COMPANY *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—APRIL, 1883.

IN EQUITY.

1. REMOVAL OF CAUSES—PRINCIPAL IN BOND.—The provision of the statute requiring the party who desires to remove a cause from the State to the Federal Court, to "make and file" a bond with the petition, does not require that the bond shall be *signed* by such party. It may be signed by a different person named therein as principal, and another as surety.

2. TERM AT WHICH REMOVAL CAN BE HAD.—If, in consequence of the want of diligence on the part of the applicant for removal, the issue in the cause is not made up, or if, having the right to have the cause heard, or set down for hearing, he does not ask for it, it is too late at a subsequent term to take steps for removal.

Motion by plaintiff to remand cause to the Circuit Court of Cook county, from which it was removed by defendant.

A. B. Jenks, for plaintiff.

Williams & Thompson, for defendants.

DRUMMOND, J.—The bill in this case was filed in the State Court, February 28, 1882, and, on the 29th of April following, a general demurrer to the bill was filed. The case seems to have stood in that position from that time, without any action upon the demurrer, and without any order of the court allowing it to be withdrawn, until January 29, 1883, when a general answer to the bill was filed, the effect of which was, to waive the demurrer or withdraw it from the case.

The record does not show that any notice was served upon the plaintiff or its attorney of the answer which had been filed, as indicated in section 28 of chapter 22 of the Revised Statutes of this state, and no replication was filed to the answer within the four days mentioned in the section, nor at any time, in the State Court. Under section 29 of chapter 22, after replication the cause is to be deemed at issue; and in default of replication, the cause may be set for hearing upon the bill and answer. No order of this kind was made, and the case stood upon the record with a bill, demurrer, and answer filed, without replication, and without any further order, until the 17th day of March, 1883, when an application was made to the State Court for the removal of the cause to this court by petition and bond. No order was made by the State Court upon the subject, but the transcript of the record has been brought into this court and filed, and a motion is now made to remand the cause to the State Court, for the reason, among others, that the application for removal was not made in time.

There was a chancery term of the State Court on the third Monday of each month, and therefore many terms had intervened after the filing of the demurrer before the application for removal was made. The question for determination is whether it was made at the term at which the cause could be first tried, and before the trial thereof.

Another reason urged by the counsel of the complainant, in favor of the motion to remand, is that the bond executed was not in compliance with the statute. The third section of the act of 1875 seems to require that the *party* desiring to remove a cause from the State to the Federal Court shall make and file a petition, and shall make and file therewith a bond, with good and sufficient surety. The bond, in this case, was not signed by the party, but was signed by another person named therein as principal, and was also signed by

a different person named therein as surety. The objection taken to the bond is that it was not signed by the party. The language of the statute is that the party seeking to remove shall "*make and file*" a bond. It seems to me we ought to consider the object of the law in requiring this bond to be made and filed. It is simply for indemnity to the party —as security that there shall be entered in the Circuit Court of the United States, on the first day of its then next session, a copy of the record, and to pay all costs that may be awarded by the Circuit Court if that court shall hold that the suit was wrongfully or improperly removed. No objection is taken to the sufficiency of the bond, or to the responsibility of the principal or the surety. It will be observed that the statute does not declare that the party shall sign the bond, but only shall make the bond. If the suit were brought by or against an infant, and he desired to remove the cause, he would not sign the bond, but his next friend or guardian named in the suit. It is admitted that in such a case as that the infant would not make and file the bond, but that the next friend or guardian would be the party who would make and file the bond. It seems to me that where the bond is presented by the party who seeks the removal, although he may not have signed it, but it is signed by others, that it may be said he makes and files it, because he presents it for the purpose of indemnifying the opposite party, and if it constitutes ample indemnity for that purpose, then he makes and files the bond in law, although he has not signed it. When a case is taken to the Supreme Court of the United States from the Circuit Court, on appeal or writ of error, it has never been supposed necessary that the party, although required to give the security, should sign the bond; but it has been considered sufficient provided a proper bond of indemnity is given by other persons. I think, therefore, that the objection taken to the bond is untenable, and con-

stitutes no sufficient reason to remand the cause to the State Court.

The other reason appears to me to be sound,—namely: that the application for removal was not made in time. The cause could have been tried, within the meaning of the statute, before the 17th day of March, when the petition and bond for removal were filed in the State Court. It seems clear that the object of the statute was to require reasonable diligence on the part of the applicant for removal, and not to allow the case to stand in the State Court beyond the first term when it could have been heard. Now, in this case, a general demurrer was filed, which stood from April 29, 1882, until January 29, 1883, when the answer was filed. If, in consequence of the want of diligence on the part of the applicant for removal the issue is not made up, or if, having a right to have the cause heard, or set down for hearing, he does not ask for it, and therefore it is not heard, it would seem reasonable to hold that at another term he should not be permitted to apply to the State Court for the removal of the cause. If, under the statute of this state, he had given notice that the answer was filed, and no replication had been filed by plaintiff within the four days mentioned in the statute, then he would have had the right to set the cause down for hearing upon the bill and answer. Having failed to do this, it may be said to have been the fault of the defendant that the case was not heard prior to March 17th, or that the case was not before that time triable, and therefore, it would seem that, having waited so long before the application for removal was made, it can hardly be said that it was at the term at which the cause could be first tried, and before the trial thereof, and therefore the case will be remanded to the State Court. *Kerting vs. American Olegraph Co.*, *ante*, 81; *Aldridge vs. Crouch*, *ante*, 180; *Murray vs. Holden*, 2 Fed. Rep. 740; *Scott vs. Clinton & S. R'y Co.*, 6 Biss. 529.

JOHN E. GLOVER vs. HARVEY C. SHEPPERD *et al.*

CIRCUIT COURT—WESTERN DISTRICT OF WISCONSIN—APRIL, 1883.

1. REMOVAL OF CAUSES—ENTERING CAUSE IN FEDERAL COURT.—If a complete transcript of the record and papers in a cause in the State Court is transmitted to the clerk of the Federal Court and placed among the files in his office, in proper time, though not marked as filed, and proceedings are subsequently taken in the cause by both parties, the cause will be considered as fully entered in the Federal Court, although no formal motion to docket it was made.

2. CITIZENSHIP AT TIME OF APPLICATION FOR REMOVAL, SUFFICIENT.—It is only necessary to show that the parties to the suit are citizens of different states at the time the application for removal is made; it need not be shown to have existed at the time of the commencement of the suit.

3. FORM OF PETITION.—It is not sufficient in a petition for removal to describe the petitioners as *residents* of certain states, they must be described as *citizens*.

4. AMENDMENT OF PETITION.—But in such case if the requisite citizenship actually exists, the Federal Court may allow the petition to be amended so as to show the facts necessary to bring the case within the Removal Act.

This case was commenced in the Circuit Court of St. Croix county, Wisconsin. On February 20, 1882, the defendants, being non-residents of the state, filed their petition in the State Court for the removal of the cause to this court, and filed a proper bond as required by law. Thereupon the court granted the petition, and the original papers, with a complete transcript of the record and papers in the cause, were transmitted by the clerk of the State Court to the clerk of this court, who received them and placed them upon the files in his office in March, 1882, and before the sitting of this court in June of the same year, but the papers

were not marked as filed by the clerk, nor has any motion been formally made to docket the cause in this court. But the parties, soon after the papers were sent to this court, and in May, 1882, entered into a stipulation to take testimony in the case, and a special examiner was appointed by this court and testimony was taken and the case proceeded with by both parties as properly pending in this court during the lapse of nearly three terms. In December, 1882, by stipulation of the parties, the case was set down for trial at the December term, 1882. The plaintiff now moves to remand the cause to the State Court on three several grounds: *First*, that the case was not entered in this court on the first day of the June term, 1882, next after the petition and bond for removal were filed, and no motion was then made to docket the cause in this court; *second*, that the petition does not show the proper citizenship of the parties at the time of the commencement of the action; *third*, that the petition does not show that the defendants were citizens of states other than Wisconsin, where the plaintiff resides and is a citizen.

S. U. Pinney, for plaintiff.

C. C. Gregory, *N. H. Clapp* and *I. C. Sloan*, for defendants.

BUNN, J.—It is evident that the first ground urged for the motion cannot prevail. It is customary to make a formal motion on the first day of the term to docket the cause, but the statute does not require this, nor that the papers should be formally filed on that day with pen and ink.

The papers being regularly transmitted to the clerk of this court, and being on the files of the court on the first day of the first term after the filing of the petition and bond, and proceedings already having been taken in this court by both

parties, they must be considered as having been filed and the cause entered. The conduct of the plaintiff in entering into a stipulation to take testimony in this court, and in taking testimony and preparing for trial and in setting the case down for trial here, would constitute a waiver of any informality of this kind. And if the case could not be considered as entered on the first day of the term, the court might allow it to be done afterwards.[1]

The second ground also furnishes no sufficient reason for remanding the cause. The petition for removal contains the following allegations: That the plaintiff is, and at the time of the commencement of said action was, a resident and citizen of the state of Wisconsin, and resides at the city of Hudson in said state. This allegation is complete under any of the removal laws. That as to the citizenship of the defendant is more open to objection, and is as follows:

"That neither of the petitioners is a resident or citizen of the said state of Wisconsin, but that the petitioner, the said Harvey C. Shepperd, resides at Worthington, in the county of Nobles, and state of Minnesota, and that the petitioner, the said Henry B. Waldren, resides at Wendham, Portage county, in the state of Ohio, and that neither of the petitioners was a resident of the state of Wisconsin at the time of the commencement of the action."

It has been held under the original removal statute of 1789, though the necessity of such holding has been questioned and is not very apparent, that the allegation of citizenship must relate to the time of the commencement of the action.[2]

It is difficult to find anything in the statute to render such

[1] *Jackson vs. Ins. Co.*, 8 Woods, 413; *Railroad Co. vs. Koontz*, 104 U. S. 16.

[2] *Brown vs. Keene* 8 Pet. 112; *Ins. Co. vs. Pechner*, 95 U. S. 183; S. C. 65 N. Y. 199.

a holding necessary; and, especially when the purpose of the law is considered, which was evidently to allow controversies arising between citizens of different states to be determined in the Federal Courts, as the Constitution provides they may be, it would seem that a more liberal construction of the statute might have been adopted to further the object in view. Dillon on Removal of Causes, 88. But no doubt such was the law under the original removal provision of 1789.

But such has never been the holding under the act of 1866 or that of 1875. One evident purpose and effect of the act of 1875 was to enlarge the jurisdiction of the Federal Courts in removal cases, and to make the statute more nearly commensurate with the constitutional provision. Section 2 provides "that any suit of a civil nature, at law or in equity now pending or hereafter brought in any State Court, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, * * * in which there shall be a controversy between citizens of different states, * * * either party may remove said suit into the Circuit Court of the United States." * * * There are evidently no words here that can confine the removal to cases where the requisite citizenship exists at the time of the commencement of the action. Such a construction would defeat the language as well as the intent of the statute. It is enough that the proper diverse citizenship of the respective parties should exist when the application for removal is made.[1]

It remains to consider whether the third ground for remanding is well chosen, and if so whether there has been any waiver of the defect, and it is curable by amendment. The

[1] *Johnson vs. Monell*, 1 Woolw, C. C. 390; *Jackson vs. Ins. Co.*, 3 Woods, C. C. 418; *McGinnity vs. White*, 3 Dill. 350; *McLean vs. St. Paul & C. R. Co.*, 16 Blatchf. 309; *Hewitt vs. Phelps*, 105 U. S. 393; Dillon, Rem. Causes, (3d Ed.) 88.

precise facts proper to have been alleged were that at the time of making the application for removal the plaintiff was a citizen of Wisconsin, and the defendant Shepperd was a citizen of Minnesota, and defendant Waldren of Ohio. The allegation in regard to the plaintiff is sufficient, though it contains considerable superfluous matter. The allegation in regard to the defendant is defective in that it alleges that the defendants were residents of Minnesota and Ohio, instead of citizens. The defendants' counsel insists that it must follow from the allegation that neither of them were citizens of Wisconsin, but that one was a resident of Minnesota and the other of Ohio; that they were either citizens of the United States or aliens. But I do not think that follows, even if such an inferential way of stating the case were allowable. They might for all that appears be citizens of a territory, or the District of Columbia, in either of which cases this court could not take jurisdiction.[1] But I cannot concede that an allegation in the alternative, that defendants were citizens of certain of the United States, or aliens, would be good. Whatever the ground of jurisdiction be, whether citizenship or alienage, it should be stated directly and positively, and not in the alternative, or in such a manner as to leave the court to reason the case out from premises alleged; and such has always been the rule.[2] An allegation of residence, in legal acceptation, is not equivalent in these cases to an allegation of citizenship. A man may be a resident of a state and be a citizen of another state, or of the District of Columbia, or of a foreign country; though it was held in *Gassies vs. Ballon*, 6 Pet. 761, that an averment that the defendant was a naturalized citizen of the United States and resided in

[1] *Hepburn vs. Ellzey*, 2 Cranch, 445; *New Orleans vs. Winter*, 1 Wheat. 91; *Barney vs. Baltimore*, 6 Wall. 287; *Cissel vs. McDonald*, 16 Blatchf. 150.

[2] *Tugman vs. Steamship Co.*, 76 N. Y. 207; *Goddard vs. Bosson*, 21 Kan. 139.

Louisiana, and the plaintiff was a citizen of France, was enough to give jurisdiction to the court. See *Parker vs. Overman*, 18 How. 137. But that is not an authority here, because there is nothing to show that these defendants are citizens of the United States at all. So that I think if the objection to the defect in the allegations of the petition has not been waived, and there is no power of amendment in the court in such cases, the cause must be remanded to the State Court. And this brings me to the most important and delicate question in the case; whether such a defect can be waived by the parties or cured by amendment, to make the petition correspond with the actual facts.

There is no room for any reasonable doubt, even upon the record, that this was a proper case for removal to this court. There has been no collusion, nor any attempt to get a case into this court that does not properly belong here. It is simply an endeavor in entire good faith on defendants' part to remove a case to this court, when the requisite facts as to citizenship existed, both at the commencement of the action and the filing of the petition but resulting in a failure from want of use of the proper legal phraseology to bring the case within the requirements of the statute. The pleaders, when attempting to set out the citizenship of the parties, have inadvertently used the words "resident" and "citizen" indifferently in their popular senses as synonomous terms. The defect has not been discovered, or, if discovered, no notice taken of it, until the lapse of nearly three terms of this court since the transmission of the papers, and until the cause has been proceeded with and evidence taken in this court under stipulation of parties, and until the case is set down for trial and supposed to be ready for trial. The record sent from the State Court also shows, in an affidavit made on the part of the plaintiff to obtain an order for the publication of the summons against defendants as non-residents, that one of

them resides in Minnesota and the other in Ohio, and that they were neither of them residents of Wisconsin.

The defendants now ask to amend the petition, and stand ready to verify all the facts necessary to give jurisdiction to this court. In the circumstances of the case, and after a careful view of the question and the authorities, I am of opinion that it is within the power and discretion of this court to grant the amendment, and that it is a proper case for the exercise of that discretion.

In *Parker vs. Overman*, 18 How. 141, the petition for removal did not contain the proper averment as to the citizenship of the parties, and the defect was as in this case. It was alleged that the plaintiff resided in Tennessee and the defendant in Maryland. But the Supreme Court says that as the record was afterwards so amended as to show conclusively the citizenship of the parties, the court below had, and this (the supreme) court have undoubted jurisdiction of the case. This looks much like a direct sanction by the Supreme Court of such an amendment, and perhaps is authority enough; and yet, as it has been common to assume that the question is so far jurisdictional as to disarm the court of its usual power to grant relief by amendment, it may be well to cite further authority, and also to see how the case stands upon principle.

In *Gold Washing & Water Co. vs. Keyes*, 96 U. S. 202, the court says: "For purposes of the transfer of a cause, the petition for removal, which the statute requires, performs the office of pleading." And this is undoubtedly its true character. And, in the same case, the court says: "The record in the State Court, which includes the petition for removal, should be in such a condition when the removal takes place as to show jurisdiction in the court to which it goes. If it is not, and the omission is not afterwards supplied, the suit must be remanded;" clearly recognizing the

power of amendment to supply defects in the record. When pleadings have already been put in in the State Court, the petition is in the nature of a supplemental complaint or answer, alleging the facts showing jurisdiction in the Federal Court. If the suit had originally been brought in the United States court, the declaration or bill of complaint would have performed the same office of setting forth these facts. But no one in such case would ever think of questioning the power of the court to allow an amendment of any allegation relating to the citizenship of the parties, or any other allegation, the purpose of which should be to show jurisdiction in the Federal Court. But where is the distinction between the two cases? Whether the case is commenced in the State or Federal Court, it is essential that the record should show on its face all the facts necessary to give jurisdiction to the court. But the requirement is quite as imperative in the one case as the other. But in cases originally brought in this court the authority is uniform that such amendment of jurisdictional facts will be allowed. And the statute certainly seems broad enough to cover any pleading, process, or proceeding. *Conolly vs. Taylor*, 2 Pet. 556, by MARSHALL, J.; *Jackson vs. Ashton*, 10 Pet. 480, decided by STORY, J.; *Kelsey vs. Railroad*, 14 Blatchf. 89; Bump, Fed. Proc. 148, and cases cited.

In one case the plaintiff, in his petition, by inadvertence of his attorney, described himself as a citizen of the state where the suit was brought, so that it appeared affirmatively on the record that plaintiff and defendant were citizens of the same state. The removal was had, and in the Federal Court the plaintiff was allowed by Mr. Justice BRADLEY to amend his petition to correspond with the fact. *Barclay vs. Levee Com'rs*, 1 Woods, 254. See, also, to like effect, *Houser vs. Clayton*, 3 Woods, 273, where Mr. Justice BRADLEY says there is no good reason why a defendant

should not be allowed to amend his petition, if, by inadvertence, it is imperfect as first presented.

So in *Hodson vs. Bowerbank*, 5 Cranch, 303, decided by MARSHALL, J., the defendants were described in the petition as late of the district of Maryland, merchants, but were not stated to be citizens of Maryland. The plaintiffs were described as aliens. The allegation as to defendants was held fatal as not showing defendants citizens of some particular state, but the court afterwards allowed the record to be amended by consent. As consent could not of itself confer jurisdiction, it is evident, if the record could be amended by consent so as to bring the case within the constitutional provision, it could be so amended in a proper case on motion without consent. See, also, the late cases of *Deford vs. Mahaffy*, 13 Fed. Rep. 481, and *Wooldredge vs. McKenna*, 8 Fed. Rep. 650.

In a recent unreported case decided by Judge BLODGETT, *Young et al. vs. Miller et al.*, there was found to be a material defect in the removal bond, which was drawn and conditioned according to the old statute, while the removal was asked for under the act of 1875. The State Court had approved the bond and ordered the removal. It was held, upon objection for the first time taken in the United States court, that the party asking for the removal should be allowed to file a new bond conforming to the statute.

In *Davis vs. Lathrop*, 13 Fed. Rep. 565, it was held by WALLACE, J., that a party loses his right to object to the removal of an action in a case like this by going to trial without raising the objection. That is not an authority here, and yet, if in that case the question was so far jurisdictional that the defect could not be cured by amendment, it is difficult to see how it could be cured by waiver. Whether taking important steps in the cause and preparing it for trial in this court would deprive a party of the right to take

advantage of such a defect or not, it is quite clear that it furnishes abundant motive for the exercise of a liberal discretion on the part of the court to allow an amendment of the record; if the court has power to allow such amendment, and I believe it has.

Section 3 of the act of 1875 was intended to provide a method of procedure for transferring a cause by either party to the Federal Court, where there should be a controversy between citizens of different states, or a question arising under the Constitution or laws of the United States. The purpose was to provide proper and reasonable means for securing a trial in that court, which has proper jurisdiction of the case. No one's rights are menaced; no one's rights are to be divested or taken away. The object is to secure a right which both parties alike have, by the constitution and laws, to have the case litigated and determined in one court rather than another; and to construe a law which provides a mere procedure for certain cases as being in the strictest sense mandatory, is, in my judgment, to disregard all the analogies of the law in other similar cases.

The motion to remand will be overruled, upon the defendants amending their petition so as to show the facts in regard to the citizenship of the defendants necessary to bring the case within the statute.

FRANK KERTING vs. F. W. COTZHAUSEN *et al.*

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1883.

1. REMOVABLE CONTROVERSY BETWEEN PLAINTIFF AND EACH DEFENDANT IN ACTIONS OF TORT.—In an action of trespass brought in the State Court against several defendants, one of whom is a citizen of a different state from that of the plaintiff, and others are citizens of the same state with the plaintiff, if the citizen of a different state files a several plea, he can remove the cause to the Federal Court on the ground that there is a controversy in the case solely between him and the plaintiff.

2. WHOLE SUIT REMOVED.—In such case the removal will carry with it the entire suit.

Barker & Green, for plaintiff.

Stiles & Lewis, for defendants.

DRUMMOND, J.—This is an action of trespass *de bonis asportatis*, brought by the plaintiff, a citizen of Illinois, against two defendants citizens of Wisconsin, and two citizens of Illinois. Cotzhausen, a citizen of Wisconsin, one of the defendants, made an application for the removal of the cause to this court on the ground that there was a separable controversy which could be fully determined as between him and the plaintiff, and in which he was interested.

A motion is now made by the plaintiff to remand the cause, for the reason that it was not a removable case. It is claimed in the petition for removal that the defendants who are citizens of Illinois, are only nominal parties; that the real party in interest and between whom and the plaintiff the controversy exists, is the citizen of Wisconsin.

The pleas of the defendants are separate, and it is claimed that in each plea there is an issue made between the defendant filing the plea, and the plaintiff, which is solely between them, and can be fully determined by the court; that it was not necessary, if the trespass was joint, that the plaintiff should sue all the defendants; that he had the right to sue each one separately, and, therefore, while others are joined, they are not necessary parties to the suit of the plaintiff against Cotzhausen as in the case of a contract of partnership or an agreement.

This, therefore, is an action of trespass against defendants who may all be severally liable for the damages which may have been sustained by the plaintiff; or one or some of whom may be held liable and others not.

The question distinctly made in this case has not yet been decided by the Supreme Court of the United States, and I am not aware that it has been decided by any Circuit Court. It is whether in an action of trespass brought against several defendants, and one of them is a citizen of a different state from that of the plaintiff and the others are not, the citizen of a different state can remove the case on the ground that the controversy is solely between him and the plaintiff, and can be fully determined as between them.

It is not necessary to decide what would be the effect of a joint plea by all the defendants in such a case. In this case there is a several plea by the defendant, a citizen of Wisconsin, and under the declaration of the plaintiff and the plea of the citizen of Wisconsin, the issue is solely between them, and therefore constitutes a controversy which can be fully determined as between them.

In all of the cases which have been decided where one or more of the defendants were citizens of the same state as the plaintiff, and one or more were not, and it has been held that the cause could not be removed, it was for the reason that all

of the defendants were indispensable parties as where the controversy grew out of a contract. This is a tort where each person is severally liable, and I think that the court can take jurisdiction of the case, and although the controversy is several, still there is such a union in the case that the whole cause must necessarily be removed, and therefore the motion to remand will be overruled.

HARLAN and BLODGETT, JJ., concurring.

THE PEOPLE OF THE STATE OF ILLINOIS vs. THE CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY.

CIRCUIT COURT—NORTHERN DISTRICT OF ILLINOIS—JUNE, 1883.

REMOVAL OF CAUSES—CONSTITUTIONAL QUESTIONS.—In order for a railroad company to remove a suit brought against it for extortion, from a State to the Federal Court, on the ground that a statute of the state impairs the validity of its charter in violation of the United States Constitution, it is not necessary to decide that the immunity claimed by the defendant can be sustained. If it appears that there is in the suit a *question* arising under the National Constitution, that is sufficient.

Motion to remand cause to Warren county Circuit Court, from which it was removed by defendant to this court.

James McCartney, Attorney General of Illinois, for plaintiff.

Wirt Dexter, for defendant.

State of Illinois vs. C. B. & Q. R. R. Co.

DRUMMOND, J.—This was an action brought by the state in a State Court against the railroad company for unjust discrimination in the carriage of freight in violation of a law of the state. A petition and bond were filed in the State Court to remove the cause to this court, under the second section of the act of 1875, on the ground that it involved a question arising under the Constitution of the United States.

The controversy arises upon that part of the line of road covered by the Peoria and Oquawka charter of October 12, 1849, the second section of which contains the following clause: "The said corporation shall have the right to prescribe the manner in which said railroad shall be used, by what force the carriages to be used thereon may be propelled, to regulate the time and manner in which goods, effects and passengers shall be transported and carried on the same, and the rate of toll on the transportation of property thereon."

The defendant claims that this was a grant by the state, conferring upon the railroad company, without any qualification, the right to prescribe upon what terms and at what rates freight should be transported on the road, and that this grant was protected by the Constitution of the United States, and that the statute of the state of 1873 upon the subject, impaired the validity of that grant, in violation of the Constitution. A motion is now made to remand the case to the State Court, because, as the Attorney General of the state insists there is no constitutional question in the case. The motion is founded, mainly, on the recent decisions of the Supreme Court of the United States in *Ruggles vs. The People of the State of Illinois* and the *Illinois Central Railroad Company vs. Same.*[1]

[1] Decided at October Term, 1882, of Supreme Court, and not yet reported.

The only point we can consider here is whether there appears to be such a question in the case, and not whether the immunity claimed by the defendant can be sustained. Even if we admit, for the sake of the argument, that by a decision of the Supreme Court of the United States in another case, which should be regarded as settling the law upon the subject, under similar facts to those of this case, no constitutional question could arise and, therefore, that this court ought not to take jurisdiction of the case, yet, the ground upon which the decision in the two cases referred to, was placed by the Supreme Court, was, that the charter of the respective companies declared that the board of directors should have power to establish such rates of toll for the conveyance of persons and property as they should, by the by-laws, from time to time, establish, and that the charter of the company, in each case, declared that the by-laws should not be repugnant to the laws of the state, and, therefore, it was necessarily implied that there was a power reserved in the state to determine the tolls on freight and passengers.

And, besides, it is to be observed that the Supreme Court of the United States in the cases referred to, did not decide that no constitutional question arose in those cases, but only that the privilege, claimed under the Constitution was not sustainable.

Indeed, as both cases were writs of error from the Supreme Court of the state of Illinois, those writs of error could only be sustained on the ground that there was a question arising under the Constitution or laws of the United States.

There seems to be no qualification in this case, but there is an absolute grant by the state. Whether the act of the Legislature of this state of 1873, does impair that grant, is not for us now to decide. The only question is whether a claim can be fairly made under it, so as to raise a constitutional question.

We think there can be no doubt that a constitutional question does arise in this case, and, therefore, this court, under the act of Congress of 1875, can take jurisdiction, and the motion to remand is, consequently, overruled.

HARLAN and BLODGETT, JJ., concurring.

INDEX.

ACCIDENTS—*See* HORSE-RACING.
ACTIONS—*See* ULTRA VIRES, 2.
ADMIRALTY—*See* INSURANCE LAW, 7-14.

1. JURISDICTION—DECLARING BILL OF SALE OF VESSEL A MORTGAGE SECURITY.—A court of admiralty has no jurisdiction over a libel which seeks to have a bill of sale of a vessel declared a mortgage and a mere security for a loan, and which asks for an accounting of the earnings of the vessel, and prays for a decree declaring the mortgage satisfied and for reconveyance of the vessel. *The C. C. Trowbridge*, 154.
2. BREAKING UP OF VOYAGE—WAGES.—A contract between a seaman and the master of a vessel for the round trip is broken by the breaking up of the voyage either by collision or laying up for winter; and the seaman is entitled to a *per diem* compensation for the time during which he has rendered service, and may leave the vessel without helping to discharge her. *Thorson vs. Peterson*, 407.
3. *Thorson vs. Peterson*, 10 Bissell, 530—affirmed. *Id.*
4. If seamen are hired late in the fall for a voyage on the lakes, and the vessel is obliged, on account of the approach of the winter season to lay up at some intermediate point until spring, the contract of hiring is thereby ended, and the seamen are not obliged, nor would they have any right to remain on board the vessel during the winter and until the opening of navigation in the spring, under the original contract of hiring. *Boulton vs. Moore*, 500.
5. RIGHT OF SEAMEN TO WAGES AND EXPENSES.—When the contract of service is thus terminated by the breaking up of the voyage for the winter, the seamen are entitled to their wages up to that time, and to their expenses either back to the port of starting or to the port of destination as may be equitable under the particular circumstances of each case. *Id.*
6. CONTRACTS.—Vessel owners may specially contract with seamen as to their respective rights in case of detention of the vessel for the winter at an intermediate port. *Id.*

ADMIRALTY—*Continued.*

7. Affirming *The Zach Chandler*, 10 Bissell, 372. *Id.*
8. COLLISION—WANT OF LIGHTS—NEGLIGENCE.—The fact that a vessel does not have lights burning after sunset as required by law, does not constitute contributory negligence and cannot be set up as a defense to a libel for damages by a collision, unless the want of lights caused or contributed to the collision. *The Buckeye*, 92.
9. NAVIGATION OF CHICAGO RIVER—RATE OF SPEED.—As a rule it is negligence *per se* for a vessel to be moving in the Chicago River, between the Main street bridge and Allen's slip, where the river is extremely crooked, faster than three miles an hour during the season of navigation when the river is crowded with other craft; and whatever be the rate of speed, the vessel should be completely under control, so that she can be stopped or her course changed promptly. *Id.*
10. CHARTER OF VESSEL—KNOWLEDGE OF COURSE OF BUSINESS AT PORT OF DESTINATION PRESUMED.—A party making a charter of his vessel to carry a cargo to a certain port, must be presumed to know the course of business at the port of destination, and if there is only one elevator at such port where the cargo can be unloaded, it will be presumed that he made his contract with that fact in view. *Finney vs. Grand Trunk R'y Co.*, 370.
11. DEMURRAGE—ONE ELEVATOR AT PORT.—And if the vessel is delayed for several days at the port of destination because other vessels which have arrived there ahead of her, are in turn unloading at the one elevator, there is no liability for demurrage for the delay so caused. *Id.*
12. LIMITATION OF LIABILITY UNDER RULES, 54, 55, 56 AND 57—STIPULATION—INTEREST AND COSTS ALLOWED WHEN LIABILITY CONTESTED.—If the owners of a vessel apply to the court under Rules 54, 55, 56 and 57 in admiralty for the limitation of their liability as such owners, for damages occasioned by a collision in which such vessel took part, and the vessel is appraised, and a stipulation with approved sureties is given for the payment into court of the appraised sum whenever the court should so direct, the owners retaining possession of the vessel; and such owners then go on and contest their personal liability and the liability of their vessel for such collision, if it be decided that they are liable, and the amount of the allowed claims against the vessel exceeds the amount mentioned in the stipulation, the owners will be liable for interest on such sum, and the costs of the libellants, in addition to the sum mentioned in the stipulation. *The Favorite*, 283.
13. SURETIES NOT LIABLE FOR INTEREST AND COSTS.—But such liability for interest and costs will not be extended to the sureties in the stipulation, unless expressly mentioned therein. *Id.*
14. PRESUMPTION OF UNSEAWORTHINESS OF VESSEL.—If a vessel soon

ADMIRALTY—*Continued.*

after leaving port upon a voyage, without encountering any severe storm or other extraordinary peril of the sea, finds herself unable to proceed on the voyage, and on making a near port of safety in a leaking condition, it is discovered that her timbers are badly rotten, and her condition such that she cannot be made seaworthy by any ordinary repairs, there is a strong presumption that the vessel was unseaworthy when she started on her voyage. *Higgie vs. National Lloyds*, 395.

15. SALVAGE.—The relief of a vessel from an impending peril of the sea by the voluntary exertion of those who are under no legal obligation to render assistance, and the consequent ultimate safety of the vessel, constitute a case of salvage. *The Hyderabad*, 112.

16. CIRCUMSTANCES CONSTITUTING CASE OF SALVAGE—DERELICT.—Where a vessel has been injured by a collision and thereby rendered so unsafe that the master and crew went aboard the colliding vessel, leaving the injured one to drift, but without intending to abandon such vessel; and with the intention of proceeding to the nearest port to procure a tug with which to pursue and rescue such injured vessel; and about thirty hours thereafter a steam barge sights the deserted vessel drifting helplessly at sea in great peril, and goes to her assistance and takes her in tow, before her master comes to her assistance with a tug, which he subsequently does; in such case, although it is doubtful whether the deserted vessel was strictly and technically derelict, yet this would constitute a case of salvage. *Id.*

17. RIGHT OF SALVORS TO RETAIN POSSESSION OF VESSEL.—The finders of the wrecked vessel having originally taken lawful possession of her, had the right as salvors to retain possession until their just demands should be paid, or until the vessel should be taken into the custody of the law preparatory to the amount of salvage being legally ascertained. *Id.*

18. AMOUNT OF SALVAGE.—In determining the amount of salvage to be awarded under the circumstances of this case, the court takes into consideration the fact that the master and crew of the wrecked vessel were in pursuit of her with a tug, and accompanied her into port with her salvors, as a fact bearing upon the probability of her ultimate rescue by them. *Id.*

19. SPARK ARRESTERS UPON STEAM-VESSELS—NEGLIGENCE.—Though a steam vessel be provided with all the equipment, machinery and mechanical appliances required by the Act of Congress regulating steam vessels, yet the failure to use a spark-arrester in or upon her chimney may be negligence, and the question whether it is so or not is one for the jury under the special facts of the case. *Crandall vs. Goodrich Trans. Co.*, 516.

20. ABANDONMENT OF VERBAL CHARTER—RIGHTS OF PARTIES—WAGES.

ADMIRALTY—*Continued.*

—A verbal contract of charter of a tug boat for the season may be abandoned by the parties thereto after the tug has been operated some time under such charter, and the party operating it be allowed wages for that time, and if the interests of third parties have not intervened, such wages would be a lien on the tug. *The Louis Dole*, 479.

21. LIEN FOR WAGES NOT WAIVED BY PRESENTING CLAIM IN BANKRUPTCY AGAINST OWNER.—A seaman by presenting his claim for wages against the owner of a vessel in bankruptcy does not waive his maritime lien on vessel. *Id.*

22. LIBEL FOR WAGES—STALE CLAIM.—The failure to file a libel for wages for more than a year after the service ended and more than two years from the time it commenced, during all of which time the tug was in port subject to seizure, *held*, under the circumstances, not to render the claim stale. *Id.*

AGENTS—*See* PRINCIPAL AND AGENT.

APPEARANCE.

1. If defendants who are not served with process in a suit in a State Court enter their appearance by counsel solely for the purpose of joining in a petition for removal to the Federal Court, "and for no other purpose whatsoever," as expressed, and the cause is removed to the Federal Court, such appearance so entered will, it seems, give the court jurisdiction over such defendants for all purposes the same as though process had been personally served upon them. *Deakin vs. Lea*, 34.

2. While a resident of one state is attending the Federal Court in another state as a witness, in obedience to a subpœna, he is privileged from service of summons in a civil action, and if such witness is served with a summons from a State Court, the filing in that court of a petition and bond for removal to the Federal Court, is not such an appearance as will prevent him from objecting to the service when the case is removed to the Federal Court. *Atchison vs. Morris*, 191.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. INSOLVENT DEBTOR MAY IN GOOD FAITH PREFER A CREDITOR.—An insolvent debtor, in the absence of a bankrupt law, has the absolute control of his unincumbered property, and he may prefer one creditor to the exclusion of all others, whether that creditor's debt is or is not yet due. But while the motive which prompts the debtor thus to favor one creditor over another may not be material, it is essential to the validity of the transfer, that it be made in good faith, and solely in payment of an honest debt. *Smith vs. Craft*, 340.

2. BARGAIN FOR PERSONAL ADVANTAGE RENDERS PREFERENCE VOID.—Any bargain for the personal advantage of the debtor over his

ASSIGNMENT FOR BENEFIT OF CREDITORS—*Continued.*

other creditors—as an agreement to employ him in winding up the business and disposing of the property—as part consideration for the transfer, renders it illegal. *Id.*

3. FRAUDULENT AGREEMENT FOR PREFERENCE.—An agreement between a debtor and one of his creditors, that if the creditor will loan him money, he will in case of his insolvency prefer such creditor, is in the nature of a secret lien, which is a fraud on the creditors who subsequently deal with the debtor without any knowledge thereof, and which will render as to them a subsequent transfer of all the debtor's property in accordance with such agreement, void. *Id.*

4. EVIDENCE TO PROVE PREFERENCE VALID.—Where an insolvent debtor prefers one of his creditors by transfer of all his property, and other creditors file a bill attacking the validity of such preference and charging fraud and collusion, in order to sustain the preference the evidence should show the manner in which the debt arose for which the preference was given, specifying dates, amounts and consideration, and give in detail the amount of the property transferred and the proceeds thereof. *Id.*

5. FRAUDULENT PREFERENCE—APPLICATION OF PROCEEDS OF PROPERTY—EQUITY RELIEF.—If a debtor has made a fraudulent transfer of all his property to one creditor, in preference, the fact that the proceeds of such property have been applied in payment of a *bona fide* debt due such creditor, will not prevent equity from interfering in behalf of other and judgment creditors to apply the proceeds of the property on their judgments. *Id.*

6. RIGHT OF OTHER CREDITORS TO BECOME CO-COMPLAINANTS.—After the announcement of the finding of the court in favor of the complainants attacking the fraudulent preference, if other creditors come in and ask to be made parties to the suit as co-complainants, this may be done, but their claims will be postponed in favor of the original complainants. *Id.*

AUTHOR'S RIGHTS—*See* TRADE MARKS.

BANKRUPTCY—*See* STOCKHOLDERS, LIABILITY OF.

1. COMPOSITION PROCEEDINGS—DISCHARGE OF BANKRUPT.—Composition proceedings in bankruptcy confirmed by the court, constitute a discharge of the bankrupt, within the meaning of section 5116 of the Revised Statutes, relating to the second discharge of a voluntary bankrupt. *In re Jorgen Bjornstad*, 68.

2. PRIORITY OF CLAIMS DUE GOVERNMENT MUST BE ASSERTED IN BANKRUPTCY BEFORE FINAL ADMINISTRATION.—If the United States Government hold a claim against a debtor in bankruptcy, and with knowledge of the proceedings in bankruptcy fails to prove its claim, or have it allowed in some form, it cannot assert any rights against the assignee or trustee, after the estate is fully

BANKRUPTCY—*Continued.*

administered and the fund distributed under orders of the court. *United States vs. Murphy*, 415.

3. WAIVER OF PRIORITY BY GOVERNMENT.—The failure of the Government to assert its right of priority to the funds in the Bankruptcy Court, is to be deemed a waiver of such right, for it can assert such right only in the manner allowed by the Bankruptcy Act. *Id.*

4. KNOWLEDGE OF CLAIM DOES NOT RENDER ASSIGNEE PERSONALLY LIABLE.—The fact that the assignee knew of the claim of the Government against his bankrupt and failed to retain funds enough to pay it, did not render him personally liable after final distribution of the assets, if the Government did not present such claim. *Id.*

BILL OF REVIEW.

1. EQUITY PRACTICE.—An original bill in the nature of a bill of review for fraud may be filed as a matter of right, and without leave of court. *Northern Illinois Coal and Iron Co. vs. Young*, 331.

2. LIMITATION.—Such a bill filed to set aside a decree on the ground of fraud, may be filed at any time within five years from the entering of the decree. *Id.*

3. CORPORATION—RIGHT TO FILE BILL.—Where the property sold under such decree belonged to a corporation the bill to set aside the decree may be filed by the corporation, and not necessarily by its receiver, or by his authority. *Id.*

BOARD OF TRADE.

1. WAGER CONTRACTS—BOTH PARTIES MUST CONCUR.—A contract for the sale or purchase of grain for future delivery, legitimate on its face, cannot be held void as a wagering contract, merely by showing that one of the parties so understood it. To render it void it must be proved that both parties regarded it simply as a wager on differences. *Williar vs. Irwin*, 57.

2. If a purchase of grain for future delivery made in the form of a contract, is in fact simply a bet or wager on differences, the form it assumes does not affect its invalidity. *Id.*

3. CUSTOM AMONG COMMISSION MERCHANTS—CONTRACTS FOR FUTURE DELIVERY—"RINGING" CONTRACTS.—A custom among commission merchants on a Board of Trade by which, if A sells for one of his customers a certain quantity of grain for future delivery to B, who buys the same for one of his customers, and B then for another customer sells the same quantity for like delivery to C, who buys for one of his customers, and C afterwards for another customer sells the same amount for same delivery to A, who buys for another one of his customers—the commission merchants A, B and C can reciprocally surrender or cancel the contracts themselves, adjusting the differences in price, and returning margins, and each substitute his buyer customer and seller customer as parties to the con-

BOARD OF TRADE—*Continued.*

tract, himself guaranteeing the performance of such contract—such a custom is founded in commercial convenience and is valid. *Id.*

4. OPTION CONTRACTS—DEALING IN DIFFERENCES—SCOPE OF ILLINOIS STATUTE.—An agreement between a person and his broker on the Chicago Board of Trade by which he is to deal in time contracts for the purchase and sale of grain, and settle the difference so as to avoid paying for and carrying the commodities bought, does not show an intention to deal in "options to buy or sell at a future time" such as are prohibited by the Illinois statute, though the contracts might be wagering contracts at common law. *Jackson vs. Foote*, 223.
5. CONSTRUCTION OF STATUTE—NEGOTIABLE INSTRUMENTS—GAMBLING CONTRACTS.—The Illinois Statute declaring negotiable instruments given for gambling considerations and gambling contracts void, so far as it relates to dealing in grain, extends only to options to buy or sell at a future time. *Id.*
6. NOTES GIVEN FOR DIFFERENCES NOT VOID BY STATUTE.—Such statute does not cover dealing in differences, and a note given in settlement of differences, cannot be avoided in the hands of a *bona fide* purchaser, for value, before due, on the ground that it was given in settlement of a gambling contract. *Id.*
7. SUCH NOTES NOT VOID AT COMMON LAW.—The common law does not declare notes given in settlement of gambling or wager contracts void in the hands of third parties. *Id.*
8. INSURANCE OF GRAIN IN ELEVATOR—RIGHT OF COMMISSION MERCHANT TO INSURE FOR FULL VALUE.—Where a commission merchant is engaged in buying and selling grain, and in connection with such a business owns and operates an elevator in the usual way, if he receives wheat and gives receipts therefor which contain the following provision: "Wheat in store subject to our charges. Fire at owner's risk," he has such an interest in the wheat as authorizes him to insure it at its full value. *Baxter vs. Hartford Fire Ins. Co.*, 306.
9. BOARD OF TRADE—MARKET REPORTS.—The Chicago Board of Trade is a private corporation, and is under no public duty or obligation to admit persons or telegraph companies not members upon the floor of its exchange, for the purpose of collecting and sending out reports of the market as the same is developed by transactions between its members. *Metropolitan Grain and Stock Exchange vs. Mut. Union Tel. Co.*, 531.
10. TELEGRAPH COMPANIES NOT BOUND TO FURNISH MARKET REPORTS.—It is no part of the corporate duty or business of a telegraph company to collect and send out market reports, and though it vol-

BOARD OF TRADE—*Continued.*

untarily contracts to furnish such information it may terminate such contract, and it cannot be compelled to enter into another. *Id.*

BONDS—*See* INJUNCTIONS.

RAILROADS—PURCHASERS OF BONDS MUST TAKE NOTICE OF RIGHT TO CONSOLIDATE.—Persons who purchase bonds of a railway company while a statute is in force authorizing the consolidation of railroads, must be held to have contemplated at the time of the purchase of the bonds, that the railway issuing them, might consolidate with other railroad companies. ***Tyson vs. Wabash R'y Co.***, 510.

BURDEN OF PROOF—*See* EVIDENCE.

BURNT RECORD ACT.

1. PROCEEDINGS UNDER—WHO ARE TO BE MADE PARTIES THERETO.—In proceedings under the Illinois Burnt Record Act, all parties who have, or claim to have, any interest in the premises, or to whom any deed of the premises, or any part thereof, has been made and recorded, should be made parties to the suit, and the court is given the power to decide in whom the valid title exists. ***Smith vs. Gage***, 217.
2. PARTIES TO SUIT—HOLDER OF TAX TITLE.—In such a suit, a party holding a tax title to the premises is rightly made a defendant, and the court may declare such tax title invalid and set it aside. *Id.*

CANALS.

1. ABANDONMENT OF CANAL—REVERTING OF FEE—RIGHTS OF PROPERTY OWNERS—LOSS OF BENEFITS.—Where upon the construction of a canal by the state, the commissioners assessed the benefits to the property owners as equal to their damages, and the canal was abandoned immediately after its construction, it was *held* that the benefits to property owners which were taken into consideration by the commissioners in assessing the damages, having failed by reason of the abandonment of the canal by the state, the fee to the bed and banks of the canal reverted to the property owners and did not pass to the grantees of the state. *Kennedy vs. Indianapolis*, 13.
2. FEE IN STREET WHERE CANAL WAS.—If the state takes possession of a public street wherein to construct a canal, and abandons the canal upon its construction, a conveyance by the state, of the canal, its bed and banks, will not pass the title to the street. Upon the abandonment of the canal the public and the abutting property owners become re-invested with their rights. *Id.*

CAPITAL STOCK, REDUCTION OF—*See* STOCKHOLDERS, LIABILITY OF.

CHANCERY—*See* SERVICE OF PROCESS—BILL OF REVIEW.

1. NATIONAL BANKS—SUITS TO ENFORCE LIABILITY OF SHAREHOLDERS—PLEA IN ABATEMENT.—Where a bill in the nature of a creditor's bill has been filed under the provisions of the National Bank-

CHANCERY—*Continued.*

ing law, against the shareholders of a bank to enforce their liability, a suit at law brought by a receiver appointed by the Comptroller, cannot be maintained against an individual shareholder to enforce the same liability, while the former suit is pending. *Harvey vs. Lord*, 144.

2. AMENDMENT OF BILL.—Where pending the disposition of a bill in equity, a new law grants to the court enlarged powers, the complainant may file an amended bill in order to bring his suit within the provisions of the new law. *Id.*

3. POWER OF COMPTROLLER TO APPOINT RECEIVER AFTER PROCEEDINGS IN COURT.—The authority of the Comptroller to appoint a receiver to wind up the affairs of a National Bank, after a receiver has been appointed by the court and steps taken under a creditor's bill to enforce the shareholder's liability, *doubted*. *Id.*

4. PARTNERSHIP ASSETS—EQUITY JURISDICTION—MARSHALING OF ASSETS.—Where both the partners of a firm die, leaving co-partnership property which is taken possession of by their individual representatives a bill in equity will lie in favor of one of the creditors of the firm against the individual representatives, to have the assets marshaled and distributed to the creditors entitled to them. *Fisk vs. Hills*, 294.

5. In such case it is not necessary to obtain judgment before resorting to a court of equity. *Id.*

6. PROBATE JURISDICTION TO MARSHAL PARTNERSHIP ASSETS, NOT EXCLUSIVE.—The fact that the Probate Court has ample power, where partnership property has come into the hands of representatives of individual members of the firm, to direct the application of such partnership assets to the payment of partnership debts, does not deprive a court of equity of jurisdiction over a bill filed for the same purpose. *Id.*

7. FRAUDULENT PREFERENCE—APPLICATION OF PROCEEDS OF PROPERTY—EQUITY RELIEF.—If a debtor has made fraudulent transfer of all his property to one creditor, in preference, the fact that the proceeds of such property have been applied in payment of a *bona fide* debt due such creditor, will not prevent equity from interfering in behalf of other and judgment creditors to apply the proceeds of the property on their judgments. *Smith vs. Craft*, 340.

8. STATUTE OF LIMITATIONS—RECOVERY OF LANDS SOLD FOR TAXES—EQUITY JURISDICTION.—The statute of Indiana having provided that no action for the recovery of real property sold for taxes, shall lie unless brought within five years from such sale, a bill in equity cannot be maintained after the lapse of five years from a tax sale, to set aside the sale and quiet title to the land, although during a portion of the five years a decree was in force, (which was rendered by default against the complainant in this second suit and

CHANCERY—*Continued.*
on its motion was subsequently set aside,) declaring and quieting the title to such lands in the defendants to such bill. *U. M. Life Ins Co. vs Dice*, 373.
CITIZENSHIP—*See* NATURALIZATION.
COLLISION—*See* ADMIRALTY.
COMMERCE—*See* NAVIGATION OF RIVERS.
COMMISSION MERCHANT—*See* INSURANCE LAW, 2—BOARD OF TRADE.
COMPOSITION PROCEEDINGS—*See* BANKRUPTCY.
CONCEPTION, PILLS TO PREVENT—*See* CRIMINAL LAW, 10.
CONCURRENT JURISDICTION—*See* JURISDICTION.
CONDEMNATION—*See* EMINENT DOMAIN, 1-3.
CONDITIONAL FEE—*See* EMINENT DOMAIN, 3-5.
CONSOLIDATION OF RAILROADS—*See* RAILROADS.
CONSTITUTIONAL LAW—*See* NAVIGATION OF RIVERS—TAXATION.
CONSTRUCTION OF STATUTES—*See* SERVICE OF PROCESS, 10, 11.
CONTRACTS.
1. PARTNERSHIP—SCOPE OF BUSINESS—ESTOPPEL—LIABILITY ON CONTRACTS.—If one member of a firm of millers permits his co-partner to hold the firm out to the world as dealers in grain, and knowingly allows cards and letter heads to be used indicating such business, he will be liable with his co-partner on contracts for the sale or purchase of grain for future delivery, though such contracts are made without his actual knowledge, by his co-partner in the firm name. *Williar vs. Irwin*, 57.
2. WAGER CONTRACTS—BOTH PARTIES MUST CONCUR—BOARD OF TRADE.—A contract for the sale or purchase of grain for future delivery, legitimate on its face, cannot be held void as a wagering contract, merely by showing that one of the parties so understood it. To render it void it must be proved that both parties regarded it simply a wager on differences. *Id.*
3. WAGER CONTRACT.—If a purchase or sale of grain for future delivery made in the form of a contract, is in fact simply a bet or wager on differences, the form it assumes does not affect its invalidity. *Id.*
4. CUSTOM AMONG COMMISSION MERCHANTS—CONTRACTS FOR FUTURE DELIVERY—"RINGING" CONTRACTS.—A custom among commission merchants on a Board of Trade by which, if A sells for one of his customers a certain quantity of grain for future delivery to B, who buys the same for one of his customers, and B then for another customer sells the same quantity for like delivery to C, who buys for one of his customers, and C afterwards for another customer sells the same amount for same delivery to A, who buys for another one of his customers—the commission merchants A, B and C can reciprocally surrender or cancel the contracts themselves, adjusting the differences in price, and returning margins, and each substitute

CONTRACTS—*Continued.*

his buyer customer and seller customer as parties to the contract, himself guaranteeing the performance of such contract—such a custom is founded in commercial convenience and is valid. *Id.*

5. REFUSAL TO ACCEPT ARTICLES MADE TO ORDER—MEASURE OF DAMAGES.—Where a person orders an article to be manufactured according to certain measure, pattern or style, as in case of a water-wheel of a certain size and kind, for a stipulated price, upon refusal of the purchaser to accept the article ordered, the manufacturer is entitled to recover the full amount of the contract price, and is not limited to a recovery, as damages, of the difference between the contract price and the market price of the article sold. *Bookwalter vs. Clark*, 126.

6. OPTION CONTRACTS—DEALING IN DIFFERENCES—SCOPE OF ILLINOIS STATUTE.—An agreement between a person and his broker on the Chicago Board of Trade by which he is to deal in time contracts for the purchase and sale of grain, and settle the differences so as to avoid paying for and carrying the commodities bought, does not show an intention to deal in "options to buy or sell at a future time" such as are prohibited by the Illinois statute, though the contracts might be wagering contracts at common law. *Jackson vs. Foote*, 223.

CONTROVERSY—*See* REMOVAL OF CAUSES.

CONVEYANCES—*See* TITLE.

CORPORATIONS—*See* BILL OF REVIEW—STOCKHOLDERS, LIABILITY OF—SUBSCRIPTION TO STOCK—ULTRA VIRES.

COSTS—*See* ADMIRALTY, 12, 13.

UNINTENTIONAL INFRINGEMENT OF PATENT.—Where the infringement is neither malicious nor willful, and the defendants offer at the outset to pay the complainant the amount of net profits realized by them, which offer is rejected, the defendants will not be required to pay the costs unnecessarily accumulated by the complainant. *Ford vs. Kurtz*, 324.

COUNTERFEITING.

1. FRAUDULENT BOND.—A bond resembling a United States bond, but unexecuted, is not an "obligation or other security" within the meaning of §5430, R. S., and an indictment for having it in possession cannot be sustained under that section. *United States vs. Sprague*, 376.

2. DEGREE OF SIMILITUDE REQUIRED.—To constitute the offense, it is not necessary that the fraudulent bond should purport to be an obligation of the United States, or that the similitude should be such as to deceive experts or cautious men; it is sufficient that it be calculated to deceive an honest, sensible and unsuspecting man of ordinary observation and care, dealing with a man supposed to be honest. *Id.*

CREDITOR'S BILL—*See* NATIONAL BANKS.
CRIMINAL LAW—*See* PRACTICE.

1. COMMUNICATION BY JUDGE WITH JURY.—Though it is irregular and objectionable for a judge to answer privately by note, a communication from one of the jurors, while the jury are deliberating upon their verdict; yet a judgment will not be reversed upon this ground unless it appears that such action worked a prejudice to the accused. *Doyle vs. United States*, 100.
2. PRESENCE OF JURY WHEN SEALED VERDICT IS OPENED MUST BE SHOW BY RECORD.—Where the accused consented that when the jury had agreed upon a verdict they might sign and seal the same, and if the court was not then in session hand it to the officer in charge of the jury to deliver to the clerk, and that the jury might then disperse to meet the court, when it should again convene, it was the right of the prisoner to have the jury present in court when the verdict was opened, and if the record does not show that they were so present, the judgment will be reversed for this reason. *Id.*
3. RIGHT OF GOVERNMENT TO NEW TRIAL—ONCE IN JEOPARDY.—But in such case the Government will be entitled to a new trial, and the defendant will not be discharged on the ground that he has been put once in jeopardy. *Id.*
4. POLLING JURY AFTER SEALED VERDICT.—*It seems*, that in the Federal Court in this district the defendant is not entitled, as of right, to poll the jury when he has agreed to a sealed verdict. *Id.*
5. WRIT OF ERROR—STAY OF PROCEEDINGS.—The Circuit Court will grant a writ of error to the District Court in a criminal case, and also allow a stay of proceedings, where the error complained of is a matter about which there may be a serious question, in order to allow the defendant to take the deliberate judgment of the appellate court upon the question involved in the case. *United States vs. Whittier*, 356.
6. LOCAL MAIL AGENT IS A POSTOFFICE EMPLOYE.—A local mail agent employed by a railroad company to carry the mail-bags to and from the postoffice and the trains, who receives no compensation from the Government, but who takes the usual oath of office for the faithful discharge of his duties, is a postoffice employé within the meaning of section 5467, U. S. Revised Statutes. *United States vs. Hamilton*, 85.
7. EMBEZZLMENT OF LETTER UNDER SECTION 5467, REVISED STATUES.—And if such local mail agent receives a letter handed to him by an individual to be put upon the train outside of the mail-bag, he is intrusted with mail matter within the meaning of the statute and can be indicted for stealing the contents thereof. *Id.*
8. SENDING BY MAIL NON-MAILABLE MATTER—SUFFICIENCY OF DESCRIPTION IN INDICTMENT.—In an indictment under section 3893 of the Revised Statutes, which relates to the sending of non-mail

CRIMINAL LAW—*Continued.*

able matter through the mails, it is sufficient to describe the particular book, paper, pamphlet, etc., so as to identify the same, without setting forth in language what was contained in the book; and then allege in the language of the statute that it was of the character there described. *Bates vs. United States*, 70.

9. FICTITIOUS NAME.—The mailing of non-mailable matter to a real person under a fictitious name comes within the meaning of the statute. *Id.*

10. INDICTMENT FOR SENDING PILLS TO PREVENT CONCEPTION—USELESSNESS NO DEFENSE.—Where pills were sent in answer to a letter asking for something to prevent conception, with the statement that they were just what the writer wanted, the fact that such pills would not answer the purpose, is no defense to an indictment under this statute. *Id.*

11. BY WHOM MAIL DEPOSITED.—The non-mailable matter need not have been deposited in the mail by the defendant in person; if he authorized it, that is sufficient to sustain conviction. *Id.*

12. NON-MAILABLE MATTER WHEN INCLOSED IN SEALED ENVELOPE.—Since the statutes relating to mailing non-mailable matter was amended by the insertion of the word "writing," all writings whether inclosed under a sealed envelope or not, signed or unsigned, that are of an obscene, lewd or lascivious character, are non-mailable matter, and covered by the statute. *United States vs. Gaylord*, 438.

13. PUBLICATION OF WRITING.—Inclosing an obscene, lewd or lascivious writing in a sealed envelope, and mailing it to another, constitutes a publication of the writing. *Id.*

14. FRAUDULENT BOND.—A bond resembling a United States bond, but unexecuted, is not an "obligation or other security" within the meaning of §5430, R. S., and an indictment for having it in possession cannot be sustained under that section. *United States vs. Sprague*, 376.

15. DEGREE OF SIMILITUDE REQUIRED.—To constitute the offense, it is not necessary that the fraudulent bond should purport to be an obligation of the United States, or that the similitude should be such as to deceive experts or cautious men; it is sufficient that it be calculated to deceive an honest, sensible and unsuspecting man of ordinary observation and care, dealing with a man supposed to be honest. *Id.*

16. AFFIDAVIT FOR MATCH-STAMP BONDS—PERJURY—REVENUE LAW.—It was competent for the Treasury Department to make a regulation, that before a match-stamp bond, which shall authorize the delivery of stamps on credit to a manufacturer of matches, shall be accepted, an affidavit shall be made showing the pecuniary responsibility of the sureties; and perjury can be assigned upon such affidavit. *Ralph vs. United States*, 88.

CUSTOM—*See* BOARD OF TRADE, 8.
DAMAGES—*See* INJUNCTION.
DAMAGES, MEASURE OF—*See* MEASURE OF DAMAGES.
DEEDS.

CONVEYANCE BY PARENTS TO BABE—DELIVERY—VALIDITY.—If the parents of a child four months old, make a deed conveying to the child certain property, though it may be impossible to make an actual delivery to the infant, yet the grantors in order to make the deed valid must in some way manifest an intention to deliver it and make it effective; and where such a deed was never recorded or published, or ever afterward alluded to by either of the parents as a consummated transaction, but was found after their death among the papers of the father, it was *held* that the deed was inoperative to pass title. *Ireland vs. Geraghty*, 465.

DELIVERY—*See* DEEDS.
DEMURRAGE—*See* ADMIRALTY, 11.
DUTIES—*See* REVENUE LAW, 1-3.
DUTY OF TONNAGE—*See* NAVIGATION OF RIVERS.
EJECTMENT.

RIGHT TO NEW TRIAL.—Where an action of ejectment was commenced against several defendants, but issue was had only on a separate complaint against one of them, and judgment was rendered against that one defendant for the land, and against all defendants for costs, only that defendant against whom the judgment for the land was rendered, his heirs, assigns and representatives are concluded by the judgment, or entitled to a new trial under the statute. *Forsythe vs. Van Winkle*, 108.

EMBEZZLEMENT OF LETTER—*See* CRIMINAL LAW 7.
EMINENT DOMAIN.

1. CONDEMNATION OF LAND FOR CANAL—FEE PASSES.—The Supreme Court of Indiana having decided that where a canal is constructed by the state and damages paid for the property, the state acquires the fee to the bed of the canal and not a mere easement, this court will follow such construction of the laws of the state. *Kennedy vs. Indianapolis*, 13.
2. BENEFITS SET OFF AGAINST DAMAGES.—The Indiana Supreme Court having also decided that it was competent for the commissioners in assessing the damages to the property owners, to consider also the benefits which would result to them from the construction of the work; this court will consider that as the settled rule of the state. *Id.*
3. BENEFITS AND DAMAGES EQUAL—CONDITIONAL FEE.—But if the commissioners assess the benefits as equal to the damages, and hence find no damages to be paid, the state acquires only a conditional fee in the property taken, the condition being that the work

EMINENT DOMAIN—*Continued.*

shall be proceeded with and the benefits actually received by the property owners. *Id.*

4. ABANDONMENT OF CANAL—REVERTING OF FEE—RIGHTS OF PROPERTY OWNERS—LOSS OF BENEFITS.—And where upon the construction of a canal by the state, the commissioners assessed the benefits to the property owners as equal to their damages, and the canal was abandoned immediately after its construction, it was *held* that the benefits to property owners which were taken into consideration by the commissioners in assessing the damages, having failed by reason of the abandonment of the canal by the state, the fee to the bed and banks of the canal reverted to the property owners and did not pass to the grantees of the state. *Id.*

5. FEE IN STREET WHERE CANAL WAS.—If the state takes possession of a public street wherein to construct a canal, and abandons the canal upon its construction, a conveyance by the state of the canal, its bed and banks, will not pass the title to the street. Upon the abandonment of the canal the public and the abutting property owners become re-invested with their rights. *Id.*

EMPLOYER AND EMPLOYE—*See* MASTER AND SERVANT.

EMPLOYER, LIABILITY OF—*See* HORSE-RACING.

EQUITABLE LIENS—*See* RAILROADS, 2.

EQUITY PLEADING.

1. RE-ISSUED PATENT—PLEADING—SPECIAL PLEA.—A plea interposed to a bill in chancery to restrain the infringment of a re-issued patent, setting up that the original patent and the re-issue were for different devices or inventions, and that the claim in the re-issue was unlawfully expanded so as to embrace improvements covered by other patents issued subsequent to the original and prior to the re-issued patent, and therefore that the re-issue is void, is properly filed. Such allegations are proper matter for a special plea. *Hubbell vs. De Land*, 882.

2. RES JUDICATA.—In such case, if the plea is overruled the defendant cannot again make the same defense by way of answer under rules 34 and 39, in equity. *Id.*

3. Many cases cited and discussed; *Sharp vs. Reissner*, distinguished. *Id.*

EQUITY PRACTICE—*See* BILL OF REVIEW.

ESTOPPEL—*See* PARTNERSHIP, 1. INSURANCE LAW, 14.

1. CONVEYANCE BY STATE—TITLE—ESTOPPEL.—Where the state conveyed all the land surrounding a lake to private parties, making no express reservation of the bed of the lake, and the grantees, claiming title to the bed, laid out large sums of money in draining the lake, and subdivided and platted the bed, and subsequently the state derived title to a portion of the lots of such subdivision from such grantees, through *mesne* conveyances, and sold them out

ESTOPPEL—*Continued.*

describing them according to the subdivision and plat, and levied taxes upon all the lots of the subdivision, *held*, that the state was estopped to set up title to lots derived by the defendants through the original grantees, although the state had never actually conveyed the title to the land embraced in such lots. *State of Indiana vs. Milk*, 197.

2. A STATE MAY BE ESTOPPED.—Resolute good faith should characterize the conduct of a state in its dealings with individuals; and there is no reason in morals or law which will exempt it from the doctrine of estoppel. *Id.*

EVIDENCE.

2. BURDEN OF PROOF—INJURY AT HORSE-RACE.—In a suit for damages where plaintiff's horse was alleged to have been killed in a horse-race, the burden of proof rests upon the plaintiffs to show intentional injury or gross negligence on the part of the defendant or his jockey. *McKay vs. Irvine*, 168.

2. SECONDARY EVIDENCE ADMISSIBLE TO ESTABLISH LOST WILL—DECLARATIONS OF TESTATOR.—In a suit to establish a lost will, secondary evidence of the existence and contents of the will is admissible; and the declarations of the testator concerning the will may be shown, as well to establish its contents, as to show the probability or improbability of its destruction by him. *Southworth vs. Adams*, 256.

3. CHARACTER OF EVIDENCE NECESSARY.—The burden is on a party setting up a lost will, to prove its execution and contents by strong, positive and convincing evidence. *Id.*

4. LOST WILL—PRESUMPTION OF DESTRUCTION BY TESTATOR.—Where it is proved that a will was made, and the testator thereafter had custody of it, if it cannot be found after his death the presumption is that he destroyed it *animo cancellandi*, but such presumption is not conclusive and may be rebutted and overthrown by circumstantial proof. *Id.*

5. WEIGHT OF TESTIMONY.—To justify a settled belief that the statements of a witness are willfully fabricated, the court should not rest its judgment upon possibilities, but there should be strong circumstances and tangible facts plainly pointing to such a conclusion. *Id.*

6. The court after a full and exhaustive review of the extended facts and circumstances of this case, holds that the testator did not destroy his will *animo cancellandi*, but that it was accidentally lost from his possession shortly before his death, and should be established. *Id.*

7. EVIDENCE TO PROVE PREFERENCE VALID.—Where an insolvent debtor prefers one of his creditors by transfer of all his property, and other creditors file a bill attacking the validity of such preference and charging fraud and collusion, in order to sustain the preference

EVIDENCE—*Continued.*
the evidence should show the manner in which the debt arose for which the preference was given, specifying dates, amounts and consideration, and give in detail the amount of the property transferred and the proceeds thereof. *Smith vs. Craft*, 340.
EXECUTION, PRIORITY OF—*See* SERVICE OF PROCESS, 7.
FEDERAL JURISDICTION.
1. NEGOTIABILITY OF MUNICIPAL BONDS.—A municipal bond under seal, which is in form a simple acknowledgment of indebtedness, and an unconditional promise to pay a certain sum of money at a certain time can be assigned so as to enable the assignee to bring an action in the Federal Court. *Porter vs. Janesville*, 64.
2. FEDERAL JURISDICTION OVER PROBATE MATTERS.—Statutory provisions of the various states as to the settlement of estates by the Probate and Surrogate Courts, do not deprive the Federal Courts of jurisdiction in cases of the requisite citizenship. *Fiske vs. Hill*, 294.
FEE TO BED OF CANAL—*See* EMINENT DOMAIN, 4, 5.
FEES.
1. COMMISSION TO CLERK ON REDEMPTION.—A rule of the Federal Court requiring a person redeeming from a foreclosure sale to pay, in addition to the amount required to effect redemption, a commission of one per cent. to the clerk, sustained. *Blair vs. Chicago & Pacific R. R. Co.*, 320.
2. MARSHAL'S FEES PAYABLE IN ADVANCE.—The Marshal has the right to demand the payment of fees for the service of process in advance. *Ray vs. Knowlton*, 360.
FELLOW SERVANT—*See* NEGLIGENCE, 1.
FICTITIOUS NAME—*See* CRIMINAL LAW, 9.
FIRES—*See* NEGLIGENCE, 6–8.
FRAUD—*See* TITLE, 6.
FRAUDULENT PREFERENCE—*See* ASSIGNMENT FOR BENEFIT OF CREDITORS.
FUTURE DELIVERY—*See* BOARD OF TRADE.
GENERAL AVERAGE—*See* INSURANCE LAW, 7, 8.
GRANTS.
BY STATE—CONSTRUCTION.—In ascertaining the real meaning of the parties, a more liberal rule of construction is allowable in interpreting a grant from one state or political community to another, than is permitted in interpreting a mere private contract. *State of Indiana vs. Milk*, 197.
HORSE-RACING.
1. ACCIDENTS.—The owner of a horse, who permits the horse to be entered in a race, takes all the ordinary risks of injury to the animal which are incident to racing. *McKay vs. Irvine*, 168.
2. LIABILITY OF EMPLOYER FOR INTENTIONAL ACTS OF JOCKEY.—But

HORSE-RACING—*Continued.*

if a horse is intentionally fouled or purposely run against or interfered with by the rider of another horse, the employer of such rider is liable for the damages resulting. *Id.*

8. NEGLIGENCE OR INCOMPETENCY OF JOCKEY—LIABILITY FOR.—So too, the employer would be liable for any palpable or clear act of negligence on the part of the rider whereby a foul was occasioned, or for employing an incompetent rider. *Id.*
4. BURDEN OF PROOF—INJURY AT HORSE-RACE.—In a suit for damages where plaintiff's horse was alleged to have been killed in a horse-race, the burden of proof rests upon the plaintiff to show intentional injury or gross negligence on the part of the defendant or his jockey. *Id.*

INDICTMENT—*See* CRIMINAL LAW, 8, 10.

INFANTS—*See* DEEDS.

INJUNCTIONS—*See* TELEGRAPH COMPANIES.

1. DAMAGES—WHEN AWARDED.—Whether a suit can be maintained upon an injunction bond given in the Federal Court, under a general order of the court, conditioned "to pay all damages and costs that may be awarded * * * upon the dissolution of said injunction," when no damages were awarded by the court at the time of the dissolution, in the light of the statutes of Illinois and the decision of the United States Supreme Court in *Bein vs. Heath* —discussed but not decided. *Deakin vs. Lea*, 27.
2. In such case however, if the State Court would be compelled under the statutes to sustain the suit, the Federal Court ought to be bound by the same rule. *Id.*
3. AWARDING DAMAGES—SUIT ON BOND—FEDERAL PRACTICE.—Where upon a general order for an injunction bond in the Federal Court a bond was given in conformity to the state statutes and practice in the state courts, conditioned to pay all damages and costs that shall be awarded against the complainants and in favor of the defendant, "upon the trial or final hearing of the cause, or upon the dissolution of the injunction," and no damages are awarded by the court upon the final hearing of the case and the dissolution of the injunction, no suit can be maintained upon the bond under the ruling of the United States Supreme Court in *Bein vs. Heath*. *Deakin vs. Lea*, 34.
4. SAME.—The fact that suit can be maintained upon a similar bond, given in the State Court, under the state statutes, does not rule the practice in the Federal Court. *Id.*
5. DISSOLUTION OF INJUNCTION—INHERENT POWER OF CHANCERY COURT TO ASSESS DAMAGES.—A Court of Chancery has inherent power to assess damages upon the dissolution of an injunction; and where an injunction has been dissolved, the sounder and better rule is for the

INJUNCTIONS—*Continued.*

Court of Chancery to go on and assess the damages sustained by the party against whom the injunction issued. *Lea vs. Deakin*, 40.

6. PRACTICE IN THIS, SEVENTH, CIRCUIT.—Such is the practice which will hereafter be adopted in this Circuit. *Id.*

7. DISSOLUTION OF INJUNCTION.—If an injunction has been issued without notice to the defendant, he may make a motion to dissolve the injunction before filing his answer, and the court will consider the question of continuing the injunction as though it were a motion for an injunction, when the defendant has notice and both parties are heard. *Metropolitan Grain and Stock Exchange vs. Mut. Union Tel. Co.*, 531.

INSOLVENCY—*See* ASSIGNMENT FOR BENEFIT OF CREDITORS.

INSURANCE LAW—*See* SERVICE OF PROCESS, 10–12—STOCKHOLDERS, LIABILITY OF.

1. INSURANCE AGENTS—REVOCATION OF AGENCY.—When there is nothing in the original appointment of agents of an insurance company which binds the company to continue the agency for a specified time, the fact that the company in compliance with the Statute of Illinois, designated, from year to year, such persons as its agents on whom legal process may be served, does not imply any intention or agreement to continue the same persons as its agents during the ensuing fiscal year, or for any special time; and such agency is revocable at will. *Davis vs. N. F. Ins. Co.*, 165.

2. INSURANCE OF GRAIN IN ELEVATOR—RIGHT OF COMMISSION MERCHANT TO INSURE FOR FULL VALUE.—Where a commission merchant is engaged in buying and selling grain, and in connection with such business owns and operates an elevator in the usual way, if he receives wheat and gives receipts therefor which contain the following provision: "Wheat in store subject to our charges. Fire at owner's risk," he has such an interest in the wheat as authorizes him to insure it at its full value. *Baxter vs. Hartford Fire Ins. Co.*, 806.

3. INSURANCE OF WHOLESALE GROCERIES—WRITTEN PART OF POLICY MODIFIES PRINTED—RIGHT TO KEEP SALTPETER.—Where a policy of insurance on a wholesale stock of groceries, in the written part of the policy gives permission to keep "all articles kept for sale in such stock," and in the printed portion it is provided that the keeping of gunpowder, saltpeter, etc., without written permission, shall avoid the policy, it was *held* that,—it being admitted that saltpeter was usually kept for sale by wholesale grocers and was in fact an article in the stock of the assured at the time the risk was taken —the above written clause limited the printed condition and allowed the keeping of saltpeter. *Stout vs. Commercial Union Assurance Co.*, 809.

4. WRITTEN AND PRINTED PARTS OF POLICY CONSTRUED.—The fact that in such policy special written permission was given to keep

INSURANCE LAW—*Continued.*

gunpowder does not prove that it was the only one of the prohibited articles which was excepted from the printed condition. *Id.*

5, POLICY CONSTRUED AGAINST INSURER.—Insurance companies being in the habit of preparing their own policies, if doubts arise in their construction, they will be resolved against the company.

6. *Steinbach vs. Insurance Co.*, 13 Wallace, 183, distinguished. *Id.*

7. MARINE INSURANCE—JETTISON OF DECK LOAD—GENERAL AVERAGE—USAGE OF TRADE.—An underwriter of a hull of a vessel is liable to contribute to general average for jettison of the deck load, when the custom or usage of the trade in which the vessel is employed, is to carry part of her cargo on deck. *Hazelton vs. Manhattan Fire Ins. Co.*, 210.

8. CUSTOM OF INSURER TO CONTRIBUTE NOT ESSENTIAL.—And it is not necessary to show that there is a custom among the underwriters to contribute by general average for a cargo so carried. They must conform to the custom of the trade in which a vessel engages. *Id.*

9. ADJUSTMENT OF LOSSES—CONSTRUCTION OF POLICY—LIABILITY OF INSURER.—A clause in a policy of marine insurance providing that all matters of adjustment and settlement of losses shall be subject to the rules and regulations of the ports of New York, refers only to the manner of making the adjustment when a liability is admitted, and cannot decide the question of the existence of any liability by the usage of such ports, when the insurance is made elswhere. *Id.*

10. The rules and regulations of the "ports of New York" do not refer simply to the port of New York City, but to all the ports of that state. *Id.*

11. REFUSAL OF INSURER TO ACT—RIGHTS OF ASSURED.—If the underwriter has the right to name the adjuster to make a general average adjustment his refusal to do so will not affect the rights of the assured. *Id.*

12. MARINE INSURANCE—IMPLIED WARRANTY OF SEAWORTHINESS.—In case of insurance of the freight list of a vessel, there is an implied warranty on the part of the assured that the vessel is seaworthy when she commences her voyage, and if she is not, the risk does not attach. *Higgie vs. National Lloyds*, 395.

13. VOIDABLE INSURANCE.—MIS-STATEMENT OF RATING BY AMERICAN LLOYDS.—Where a vessel has once been classed by the American Lloyds for insurance purposes as A 1½, and then is disrated because of her condition, and the owner after making considerable repairs on the vessel, obtains a certificate restoring her to her former rating, from a person represented to be, and whom the owner supposes to be, an accredited agent of the American Lloyds, when in fact he is not; a policy of insurance obtained upon the vessel on the repre-

INSURANCE LAW—*Continued.*

sentation that she has been restored to her former rating of A 1½ by the American Lloyds, without intentional misrepresentation, is voidable. *Id.*

14. RETAINING PREMIUMS—KNOWLEDGE—ESTOPPEL.—The fact that the insurer retained the premiums, after notice of loss, until the commencement of suit, will not estop him from setting up that the policy is void by reason of the unseaworthiness of the vessel and misrepresentation in obtaining the insurance, if he did not know the facts avoiding the policy, before the loss occurred. *Id.*

INTER-STATE COMMERCE—*See* TAXATION.

JEOPARDY—*See* CRIMINAL LAW, 10.

JETTISON—*See* INSURANCE LAW, 7.

JUDGMENTS AND DECREES.

1. JOINT—SATISFACTION AS TO ONE DISCHARGES ALL.—If the Government, having a joint judgment against several defendants, enters upon the margin of the record of the judgment a satisfaction of the judgment as to one of the judgment debtors only, this will operate as a satisfaction and discharge as to all. *United States vs. Murphy*, 415.

2. A person sued on a stock subscription by a receiver appointed in proceedings to which he was only brought in by publication, is not bound by the decrees in such proceeding affecting his liability, and may defend on the merits. *McClelland vs. Whiteley*, 444.

3. TAX TITLES—JUDGMENT CONCLUSIVE AS TO VALIDITY OF TAXES.—A judgment for taxes rendered by the proper court, when it is attacked collaterally, is conclusive as to the validity of the taxes; and the owner of lands who has allowed judgment for taxes to go by default, cannot afterwards in a suit to set aside the tax sale, be heard to allege that a portion of the taxes for which judgment was rendered was illegal and invalid. *Chicago Theological Seminary vs. Gage*, 289.

JURISDICTION—*See* FEDERAL JURISDICTION—APPEARANCE.

PRIORITY OF EXECUTION.—When executions issue from both the State and Federal Courts, the one under which a seizure is first made will prevail and hold the property, although the execution of the other may have been placed first in the hands of the officer. *Leopold vs Godfrey*, 158.

JURY—*See* PRACTICE, 17, 18.

LAKES AND PONDS, TITLE TO—*See* TITLE.

LAND GRANTS.

1. LAND GRANTS—TRUSTEE—WASTE.—Where lands were granted to a certain railway in aid of construction, and upon foreclosure of a mortgage upon such railway the lands were transferred, under an arrangement, to another railroad company which issued certificates therefor entitling the holders to proportionate shares of the land

LAND GRANTS—*Continued.*

after a certain time, such railroad company was a naked trustee for the purposes named, and not liable for not preventing trespasses and waste upon the lands while so held by it. *Beecher vs. C. & N. W. R'y Co.*, 246.

2. SAME.—But if the company participated in committing, or received the proceeds of the waste, it will be compelled to account therefor to the equitable owners. *Id.*

LANDLORD AND TENANT.

LIEN OF LANDLORD.—A landlord has no lien upon the personal property of his tenant prior to the actual levy of his distress warrant. *Leopold vs. Godfrey*, 158.

LIABILITY OF STOCKHOLDERS—*See* STOCKHOLDERS, LIABILITY OF.

LIENS—*See* LANDLORD AND TENANT.

Where two or more railroad companies consolidate, and part of the consideration for the transfer of the property of one of the roads to the consolidated company is the payment by it, of certain unsecured equipment bonds issued by that constituent company, which bonds the consolidated company agrees to "protect," the holders of the equipment bonds acquire thereby an equitable lien on the property of the consolidated company for the payment of their bonds. *Tysen vs. Wabash R'y Co.*, 510.

LIMITATIONS—*See* STATUTE OF—BILL OF REVIEW.

LITERARY PROPERTY—*See* TRADE MARKS, 3, 4.

MAILING NON-MAILABLE MATTER—*See* CRIMINAL LAW, 8-13.

MAILS—*See* REVENUE LAW, 1, 2.

MARINE INSURANCE—*See* INSURANCE LAW, 7-14.

MARKET REPORTS—*See* BOARD OF TRADE, 9, 10.

MARSHALING ASSETS—*See* PARTNERSHIP, 2, 4.

MARSHAL'S FEES.—*See* FEES, 2.

MASTER AND SERVANT.

1. PATENTS—RIGHTS OF INVENTOR WHEN AN EMPLOYE.—A person is not deprived of his right to an invention made while in the service of another, unless he has been employed to exercise his inventive faculties for the benefit of that other. *Hapgood vs Hewitt*, 184.

2. RIGHT TO PATENT ISSUED TO EMPLOYE—INVENTION.—A contract by which one person agrees to pay a sum of money for the time, labor and skill of another, gives the employer no right to an assignment of a patent which is issued to the employé for an invention made during the period of employment, although such employé was assisted and aided by advice and suggestions from his employer and from other employés, and although the employer paid for the materials used in getting up the invention. *Id.*

3. LIABILITY OF MASTER FOR NEGLIGENCE OF FELLOW-SERVANT—STATEMENT OF RULE.—The rule in the Federal courts is that the master is only released from liability for injuries occurring to

MASTER AND SERVANT—*Continued.*

one servant through the negligence of his fellow-servant, when the servants are engaged in the same department of duty; and such immunity does not extend to cases where the servants are engaged in departments essentially foreign to each other. *King vs. O. & M. R'y Co.*, 362.

MASTER'S REPORT, EXCEPTIONS TO—*See* PRACTICE, 6–8.

MEASURE OF DAMAGES.

REFUSAL TO ACCEPT ARTICLES MADE TO ORDER.—Where a person orders an article to be manufactured according to a certain measure, pattern or style, as in case of a water-wheel of a certain size and kind, for a stipulated price, upon refusal of the purchaser to accept the article ordered, the manufacturer is entitled to recover the full amount of the contract price, and is not limited to a recovery, as damages, of the difference between the contract price and the market price of the article sold. *Bookwalter vs. Clark*, 126.

MORTGAGES—*See* FEES, 1—RAILROADS, 11.

1. MORTGAGEE IN POSSESSION UNDER PAROL AGREEMENT.—Even where there is a statutory provision that "unless a mortgage specifically provide that the mortgagee shall have possession of the mortgaged premises he shall not be entitled to the same," the parties can make a parol agreement to that effect, and if they do so and the mortgagee goes into possession under it, the rights of the parties are the same as if the giving of possession had been specifically provided for in the mortgage. *Edwards vs. Wray*, 251.

2. The rights of the mortgagee, in possession under such a parol agreement, to the mortgaged premises are not affected by an execution sale of such premises under a judgment the lien of which is subsequent to his possession. *Id.*

3. EXECUTION SALE OF REAL ESTATE—RIGHT TO RENTS AND PROFITS DURING REDEMPTION PERIOD WHEN MORTGAGEE IS IN POSSESSION.—The statute of Indiana of March 31, 1879, relating to the redemption of real estate sold on execution or decree of sale, and providing that in case the same is not redeemed, the purchaser shall be entitled to recover from the parties in possession during the time the real estate is subject to redemption reasonable rents and profits therefor, does not apply to the case where a mortgagee has gone in possession prior to the lien of the judgment under which the sale is made, by agreement with the mortgagor, the judgment debtor. *Id.*

MUNICIPAL BONDS.

FEDERAL JURISDICTION—NEGOTIABILITY.—A municipal bond under seal, which is in form a simple acknowledgement of indebtedness, and an unconditional promise to pay a certain sum of money at a certain time can be assigned so as to enable the assignee to bring an action in the Federal Court. *Porter vs. Janesville*, 64.

MUNICIPAL CORPORATIONS—*See* TELEGRAPH COMPANIES, 1–4.

NATIONAL BANKS.

1. SUITS TO ENFORCE LIABILITY OF SHAREHOLDERS—PLEA IN ABATEMENT.—Where a bill in the nature of a creditor's bill has been filed under the provisions of the National Banking law, against the shareholders of a bank to enforce their liability, a suit at law brought by a receiver appointed by the Comptroller, cannot be maintained against an individual shareholder to enforce the same liability, while the former suit is pending. *Harvey vs. Lord*, 144.
2. POWER OF COMPTROLLER TO APPOINT RECEIVER AFTER PROCEEDINGS IN COURT.—The authority of the Comptroller to appoint a receiver to wind up the affairs of a National Bank, after a receiver has been appointed by the court and steps taken under a creditor's bill to enforce the shareholders' liability, *doubted*. *Id.*

NATURALIZATION.

MARRIAGE OF WIDOW—INFANT SON.—If a widow and her infant son who are citizens of a foreign country come to this country, and she marries a naturalized citizen of the United States, she thereby becomes a duly naturalized citizen, and her minor son also thereby becomes a citizen. *United States vs. Kellar*, 314.

NAVIGATION OF RIVERS.

1. NAVIGATION—RIGHT OF STATE TO CONSTRUCT LOCKS AND DAMS.—The state of Illinois, in the absence of Congressional legislation upon the subject, can improve the navigable waters within its limits in the manner and to the extent it may see fit; and in so doing can construct locks and dams upon the Illinois river. *Huse vs. Glover*, 550.
2. CONSTRUCTION OF ORDINANCE OF 1787.—The ordinance of 1787 for the Government of the Northwestern Territory, providing that the navigable streams leading into the Mississippi river shall be common highways and be forever free to the inhabitants of the territory and the citizens of the United States, does not restrict the right of states formed out of such territory to put improvements in the rivers within their bounds. *Id.*
3. CONSTITUTIONAL LAW—COLLECTION OF TOLLS BY STATE.—If a state has constructed locks and dams upon a navigable river for the improvement of navigation it may lawfully charge tolls for the passage and use of the locks, based upon the tonnage measurement of the boats and their cargoes, without conflicting with the clause in the Federal Constitution which forbids a state, without the consent of Congress, from laying any duty of tonnage. *Id.*

NEGLIGENCE—*See* HORSE-RACING—ADMIRALTY, 8, 9.

1. LIABILITY OF MASTER FOR NEGLIGENCE OF FELLOW-SERVANT—STATEMENT OF RULE.—The rule in the Federal Courts is that the master is only released from liability for injuries occurring to one servant through the negligence of his fellow-servant when the ser-

NEGLIGENCE—*Continued.*

vants are engaged in the same department of duty; and such immunity does not extend to cases where the servants are engaged in departments essentially foreign to each other. *King vs. O. & M. R'y Co.*, 362.

2. RAILROAD COMPANY MUST PROVIDE SAFE ROLLING STOCK—LIABILITY TO EMPLOYE.—Railroad Companies are bound to use due care in seeing that their cars and other rolling stock are maintained in a reasonably safe condition, and when an employé, in the proper discharge of his duty, is injured from the failure of the company to perform this personal duty, it is liable. *Id.*
3. CORPORATIONS are held to the same personal responsibility as natural persons, for the negligent acts of their agents or employés. *Id.*
4. NEGLIGENCE OF CAR INSPECTOR IS THAT OF THE COMPANY.—The negligence of the car inspector in failing to detect unsafe rolling stock, in case of injury to a brakeman resulting therefrom, is to be construed as the negligence of the railroad company, and not as that of a fellow-servant. *Id.*
5. BRAKEMEN MAY ASSUME THAT CARS ARE IN ORDER.—A brakeman on a railroad has a right to assume without inspection that the cars he is required to couple are in a proper state of repair for handling, and it is not negligence on his part to rush in between two cars to make the coupling without stopping to see if the bumpers are all right. *Id.*
6. SPREADING FIRES—PROXIMATE CAUSE.—If a planing-mill is set on fire negligently by sparks from a steam vessel, and a house at some distance from the mill is fired by sparks from it, the owners of the vessel are liable for the burning of the house if their negligence in the first instance was the proximate cause of its burning. *Crandall vs. Goodrich Transportation Co.*, 516.
7. If the burning of the house was a result naturally and reasonably to be expected from the burning of the mill under the circumstances then existing, and was the result of the continued influence or effect of the sparks from the vessel without the aid of other causes not reasonably to be expected, then the owners of the vessel are liable. *Id.*
8. INJURY RESULTING FROM TWO CONCURRING ACTS OF NEGLIGENCE—EACH PARTY LIABLE.—The fact that the owner of the planing-mill negligently left combustible material on the mill dock, in consequence of which the fire was started at that place by the sparks escaping from the vessel, will not of itself relieve the owners of the vessel from liability for the injury occasioned by the spreading of the fire to the other house, if they were guilty of negligence in allowing the sparks to escape from the vessel. *Id.*
9. CORPORATIONS—NEGLIGENCE—ULTRA VIRES.—When damage is done to real estate held by a corporation, the party by whose neg-

NEGLIGENCE—*Continued.*

ligence such injury was caused cannot escape responsibility by showing that the corporation was not permitted by its charter to acquire title to the property, or that it acquired it for purposes unauthorized by law. *Farmers' Loan & Trust Co. vs. G. B. & M. R. R. Co.*, 334.

NEW TRIAL—*See* CRIMINAL LAW, 3—EJECTMENT—PRACTICE, 21.

NOM DE PLUME—*See* TRADE MARKS, 3, 4.

NON-MAILABLE MATTER—*See* CRIMINAL LAW, 8–13.

NON-RESIDENTS, SERVICE OF—*See* SERVICE OF PROCESS, 1–6.

NOTES, BILLS AND CHECKS—*See* STATUTE OF LIMITATIONS.

1. WORDS OF NEGOTIABILITY.—The word "bearer" or "order" is not essential to the negotiability of commercial paper. Other words may be used rendering it transferable. *Porter vs. Janesville*, 64.
2. CONSTRUCTION OF STATUTE—NEGOTIABLE INSTRUMENTS—GAMBLING CONTRACTS.—The Illinois Statute declaring negotiable instruments given for gambling considerations and gambling contracts void, so far as it relates to dealing in grain, extends only to options to buy or sell at a future time. *Jackson vs. Foote*, 223.
3. NOTES GIVEN FOR DIFFERENCES NOT VOID BY STATUTE.—Such statute does not cover dealing in differences, and a note given in settlement of differences, cannot be avoided in the hands of a *bona fide* purchaser, for value, before due, on the ground that it was given in settlement of a gambling contract. *Id.*
4. SUCH NOTES NOT VOID AT COMMON LAW.—The common law does not declare notes given in settlement of gambling or wager contracts void in the hands of third parties. *Id.*

OPTION CONTRACTS—*See* BOARD OF TRADE.

PARTIES TO SUIT.

1. Where the complainant, claiming title to certain real estate under one who has given a trust deed thereon, files a bill setting up that her title is superior to that of the trustee or the rights of the holder of the notes secured by the trust deed, the trustee is an indispensable party to the suit, and the holder of the notes cannot, on the ground of his own citizenship, remove the cause from the State to the Federal Court, the trustee being a citizen of the same state with the complainant. *Mitchell vs. Tillotson*, 325.
2. If a will gives to the executors thereof a certain sum of money to be held in trust for a specific purpose, the executors are indispensable parties defendant in a suit to set aside the will; and such suit cannot be removed to the Federal Court regardless of their citizenship. *Price vs. Foreman*, 328.
3. After the announcement of the finding of the court in favor of the complainants attacking a fraudulent preference, if other creditors come in and ask to be made parties to the suit as co-complainants,

PARTIES TO SUIT—*Continued.*

this may be done, but their claims will be postponed in favor of the original complainants. *Smith vs. Craft*, 840.

PARTNERSHIP.

1. SCOPE OF BUSINESS—ESTOPPEL—LIABILITY ON CONTRACTS.—If one member of a firm of millers permits his co-partner to hold the firm out to the world as dealers in grain, and knowingly allows cards and letter heads to be used indicating such business, he will be liable with his co-partner on contracts for the sale or purchase of grain for future delivery, though such contracts are made without his actual knowledge, by his co-partner in the firm name. *Williar vs. Irwin*, 57.
2. EQUITY JURISDICTION—MARSHALING OF ASSETS.—Where both the partners of a firm die, leaving co-partnership property which is taken possession of by their individual representatives a bill in equity will lie in favor of one of the creditors of the firm against the individual representatives, to have the assets marshaled and distributed to the creditors entitled to them. *Fisk vs. Hills*, 294.
3. In such case it is not necessary to obtain judgment before resorting to a court of equity. *Id.*
4. PROBATE JURISDICTION TO MARSHAL PARTNERSHIP ASSETS, NOT EXCLUSIVE.—The fact that the Probate Court has ample power, where partnership property has come into the hands of representatives of individual members of the firm, to direct the application of such partnership assets to the payment of partnership debts, does not deprive a court of equity of jurisdiction over a bill filed for the same purpose. *Id.*

PATENT LAW.

1. ESTOPPEL—INVENTION.—Where a wife allowed third parties to deal with her husband as the inventor of a device who is entitled to a patent therefor, and they have advanced necessary expenses to obtain the patent, and purchased the same from him, she will be estopped to claim afterwards that she and not her husband was the inventor of the device and entitled to the patent. *Feather Duster Company vs. Hibbard*, 76.
2. EXPERIMENTS—SUGGESTION—INVENTION.—A husband was experimenting with a view to making an improvement in feather dusters, and adopting a suggestion of his wife as to a certain device, produced a successful duster: *Held*, that the suggestion did not make the wife the inventor. *Id.*

   RIGHTS OF INVENTOR WHEN AN EMPLOYE.—A person is not deprived of his right to an invention made while in the service of another, unless he has been employed to exercise his inventive faculties for the benefit of that other. *Hapgood vs. Hewitt*, 184.
4. EMPLOYER AND EMPLOYE—RIGHT TO PATENT ISSUED TO EMPLOYE—INVENTION.—A contract by which one person agrees to pay a sum

PATENT LAW—*Continued.*

of money for the time, labor and skill of another, gives the employer no right to an assignment of a patent which is issued to the employé for an invention made during the period of employment, although such employé was assisted and aided by advice and suggestions from his employer and from other employés and although the employer paid for the materials used in getting up the invention. *Id.*

5. ELECTRIC INDICATORS FOR ELEVATORS—NOVELTY.—The Gray and Hahl patents for improvements in electric indicators for elevators, each consisting of a mechanism whereby an electric current is maintained between the signal keys on different floors of the building, and the annunciator attached to the elevator car without interruption by the movement of the car, and which allows the transmission of signals to a car when in motion, are not void for want of novelty. *Western Electric Light Co. vs. Chicago Electric Light Manfg. Co.*, 427.

6. INVENTION.—The fact that a patented device has been generally adopted for use, and that simultaneously a number of inventors gave their attention to the subject matter covered by that device, is evidence that it required inventive genius rather than mere mechanical skill to produce it. *Id.*

7. INTERFERENCE.—The Commissioner of Patents has authority to declare an interference between an application for a patent, and a patent which has already been issued. *Id.*

8. If the Commissioner of Patents, in case of interference, has, after hearing proof, decided in favor of one of the devices or inventions, a court upon the same proof will consider the decision of the Commissioner as settling the question of priority. *Id.*

9. PART DISCLAIMED IN ORIGINAL CANNOT BE CLAIMED IN RE-ISSUE.—Where the examiner of the Patent Office denies an application for a patent on the ground that the broad claim therein is anticipated by a prior device, and the applicant amends and files a disclaimer as to the part rejected by the examiner, neither he nor his assignee obtaining a re-issue covering the broad claim in the first application, can sustain such re-issued patent as to the claims covered by the disclaimer, on the ground that the decision of the examiner in the first instance rejecting such claims was erroneous, and that the claims were not in fact anticipated. *Putnam vs. Hutchinson*, 233.

10. ENLARGEMENT OF CLAIM IN RE-ISSUE—MISTAKE.—While the claim in a re-issued patent may be enlarged, this can only be done when an actual mistake has occured. *Id.*

11. REFUSAL OF EXAMINER TO PASS CLAIM—RE-ISSUE.—The erroneous refusal of the examiner to pass a claim, is not such a mistake as will entitle the inventor to a re-issue covering that claim. *Id.*

PATENT LAW—*Continued.*

12. ASSIGNEE OF PATENT—RIGHTS OF.—An assignee of a patent takes it subject to any disclaimer by the inventor and is not entitled to a re-issue covering such disclaimer. *Id.*

13. BOTTLE-STOPPERS—RE-ISSUED PATENT 9,002.—The first three claims of Re-issued Patent No. 9,002, for an improvement in bottle-stoppers, are invalid. *Id.*

14. RE-ISSUE—PLEADING—SPECIAL PLEA.—A plea interposed to a bill in chancery to restrain the infringment of a re-issued patent, setting up that the original patent and the re-issue were for different devices or inventions, and that the claim in the re-issue was unlawfully expanded so as to embrace improvements covered by other patents, issued subsequent to the original and prior to the re-issued patent, and therefore that the re-issue is void, is properly filed. Such allegations are proper matter for a special plea. *Hubbell vs. De Land*, 382.

15. RES JUDICATA.—In such case, if the plea is overruled the defendant cannot again make the same defense by way of answer under rules 34 and 39, in equity. *Id.*

16. Many cases cited and discussed; *Sharp vs. Reissner*, distinguished. *Id.*

17. PENALTIES.—A person who affixes the word "patented" and gives the date of the patent upon an article which has been patented but the patent on which has expired by limitation, is not liable to a penalty under section 4901, United States Revised Statutes: affirming *Wilson vs. Singer Mfg. Co.*, 9 Bissell, 173. *Wilson vs. Singer Manfg. Co.*, 298.

18. UNINTENTIONAL INFRINGEMENT OF PATENT—COSTS.—Where the infringement is neither malicious nor willful, and the defendants offer at the outset to pay the complainant the amount of net profits realized by them, which offer is rejected, the defendants will not be required to pay the costs unnecessarily accumulated by the complainant. *Ford vs. Kurtz*, 324.

19. STATIONARY ROCKING CHAIR.—The first claim of the patent issued to Charles Singer, July 6, 1869, for an improvement in the construction of rocking chairs, cannot be sustained in view of the state of the art, and is void. *Singer Rocking Chair Co. vs. Toby Furniture Co.*, 353.

20. ROCKING CHAIR PATENTS—MECHANICAL CHANGE.—A rocking chair constructed to move upon a stationary platform having a base or rails upon which the rockers move, the base being tongued and the rockers grooved so that the one fits into the other, the ends of the base being elevated so as to prevent the rockers from working off, with flexible rubber bands connecting the rockers to the rails of the stand to prevent the seat from moving back and forth on the

PATENT LAW—*Continued.*

rails or rocking too far either way, is a mere mechanical change from chairs in previous use, and is not patentable. *Id.*

21. PATENT NO. 229,998 FOR IMPROVEMENTS IN PRINTING PRESSES, LIMITED—DIAGONAL CHROMATIC PRINTING.—*Goss vs. Cameron*, 389.

22. SAME.—Such patent cannot be sustained for diagonal printing as a result, nor can it be extended to cover the mere mode of working a common printing press when no material changes are made in its mechanism, the working position of some of its movable parts only being changed. *Id.*

23. SECOND CLAIM OF PATENT—COMBINATION—MECHANICAL ADAPTATION—INFRINGEMENT.—The mechanical adaptation of a cylinder chromatic printing press which is arranged to do square printing, so that it will print diagonally, does not require invention, and cannot be an infringement of second claim of complainant's patent, which is limited to the use of the whole combination therein described, or known substitutes therefor. *Id.*

24. GANG PLOW BRAKES—NOVELTY—ORIGINAL DAVENPORT PATENT LIMITED.—The first claim of the original patent issued to F. S. Davenport, October 9, 1866, for an improvement in gang plows examined, and, *held*, that in view of the state of the art at that time, the patentee was not entitled to a broad claim for every device by which the plow is lifted from the ground by the power of the team through a brake or friction clutch, but must be limited to his specific device shown and described. *Newton vs. Furst & Bradley Manfg. Co.*, 405.

25. INFRINGEMENT.—The brake of the Davenport patent which was arranged to engage with the rim or periphery of one of the ground or carrying wheels, for the purpose of raising the plows out of the ground, is not infringed by the use of a friction band, arranged to engage with the extended hub of one of the carrying wheels, and accomplishing the same result. *Id.*

26. CONSTRUCTION AND LIMITATION OF RE-ISSUE.—The re-issue of the Davenport patent, of date December 2, 1879, claiming broadly the combination of a swing-axle, plow beam, carrying wheel, and friction clutch mechanism adapted to raise the plows by locking the axle to the carrying wheel, cannot be construed to include all kinds of swing-axles, friction clutches, plow beams and carrying wheels, but must be limited to the particular kind shown. *Id.*

27. RE-ISSUE—LACHES—BURDEN OF PROOF.—Where a re-issue is obtained thirteen years after the date of the original, in order to sustain the re-issue, it must be shown that there was some mistake or inadvertence in the original which made a re-issue necessary. *Id.*

28. The fact that a claim which is broader in the re-issue than in the

PATENT LAW—*Continued.*

original, might have been allowed in the original, does not show that it is valid in the re-issue. *Id.*

29. ENLARGEMENT OF CLAIM IN RE-ISSUED PATENT—WHEN VOID.—If a claim in a re-issued patent is intended to be and is an expansion of the claim of the original patent, in order to claim elements which were not claimed originally, it is void. *Fay & Co. vs. Fraser*, 422.

30. NEW CLAIMS IN RE-ISSUED PATENT—WHEN VALID.—But if new claims in the re-issue are only re-statements of the functions and mode of operation of the elements of one of the claims of the original, in combination with the other parts of the machine, then they are valid. *Id.*

31. PATENT FOR PLANING MACHINE CONSTRUED—DIVIDED PRESSURE ROLLERS.—The fourth claim in the original and the new claims in the re-issue of Goodrich and Colburn's patent, No. 111,632, re-issue No. 8,438, for "an improvement in planing machines," construed, and *held*, to require that the pressure rollers should be used in combination with the independent swinging arms which are described in the specifications; and that, in view of the state of the art, they cannot be expanded so as to cover all divided or broken pressure rollers. *Id.*

32. INFRINGEMENT.—Inasmuch as the defendant does not use the swinging arms, *held* that he does not infringe. *Id.*

33. CONSTRUCTION OF PATENTS—BOTTLE-STOPPERS—EQUIVALENTS—INTERFERENCE OF PATENTS.—The *fourth* claim of re-issue patent No. 9,002, issued to complainant, is for an internal bottle-stopper, provided with a hinged or jointed bail, which is composed of two elastic legs or branches, and of an eye or finger loop, the stopper shown in the drawings being a "plug" stopper. Defendant's patent, No. 225,476, consists of a "disk" or "valve" stopper and a bail substantially like complainant's except that the loop has an enlargement or bulge lower down, and below the top loop. *Held*, *first*, that the disk stopper being old at the date of complainant's patent, it is a mere equivalent which cannot be substituted by defendant in order to evade complainant's patent; *second*, that the bulge or enlargement in defendant's patent is a mere mechanical modification in the practical application of complainant's device; and, *third*, that defendant's patent is void by reason of its interference with complainant's re-issued patent. *Putnam vs. Hutchinson*, 240.

34. First three claims of re-issue No. 9,002 declared void. *Id.*

35. The fourth claim of re-issued patent No. 9,002, is valid. *Id.*

PERJURY—*See* CRIMINAL LAW, 16.

PILLS TO PREVENT CONCEPTION—*See* CRIMINAL LAW, 10.

POLLING JURY—*See* CRIMINAL LAW, 4.

POSTOFFICE EMPLOYE—*See* CRIMINAL LAW, 6.
PRACTICE.

1. EJECTMENT—RIGHT TO NEW TRIAL.—Where an action of ejectment was commenced against several defendants, but issue was had only on a separate complaint against one of them, and judgment was rendered against that one defendant for the land, and against all defendants for costs, only that defendant against whom the judgment for the land was rendered, his heirs, assigns and representatives are concluded by the judgment, or entitled to a new trial under the statute. *Forsythe vs. Van Winkle*, 108.
2. EQUITY PRACTICE—SERVICE OF NON-RESIDENT DEFENDANTS IN CHANCERY.—Under the Act of March 3, 1875, section 8, which provides a method for the service of non-resident defendants in certain chancery suits, it is not necessary that there shall be a marshal's return of "not found" in the district where the suit is brought, before the court can make the order directing the absent defendants to appear by a certain designated day. Such order may be made upon a proper showing by affidavit filed at the commencement of the suit. *Forsythe vs. Pierson*, 133.
3. RETURN DAY NEED NOT BE RULE DAY.—It is not necessary that the day designated for such non-resident defendants to appear and plead shall be a rule day. The court may fix upon any certain day to be set out in the order. *Id.*
4. SERVICE OF ORDER FOR APPEARANCE—BY WHOM MADE.—Such order is not a subpœna or process within the meaning of rule 15 or 17 which require that the service of all process shall be by the marshal of the district, or by his deputy, or by some one specially appointed by the court. The statute does not require any particular mode of service or proof of service. If it is made to appear that each of such defendants was actually served personally with a copy of such order, that is sufficient. *Id.*
5. SAME.—In this case, service of the order was made by the marshal, or his deputy, of the district where such defendant was a resident. *Id.*
6. EXCEPTIONS TO MASTER'S REPORT.—Where a reference is made to a master, which embraces questions of law as well as of fact, and after hearing the testimony and the arguments of counsel, the master prepares his report, it is not necessary to observe the formality of taking exceptions to the report before the master, prior to bringing the exceptions before the court. *Hatch vs. I. & S. R. R. Co.*, 138.
7. PARTY CANNOT INSIST UPON ARGUING EXCEPTIONS BEFORE MASTER.—It is not the practice in this circuit, for a master after hearing full arguments, to submit a draft of his report to the parties, in order for them to make objections thereto; and the parties have no legal

PRACTICE—*Continued.*

right to make objections to the draft of the report, and argue the same before the master. *Id.*

8. CONSTRUCTION OF EQUITY RULES.—The Supreme Court in adopting the Equity Rules, intended to dispense with the old formalities incident to settling the master's report and entering exceptions thereto. *Id.*

9. EQUITY PRACTICE.—An original bill in the nature of a bill of review for fraud may be filed as a matter of right, and without leave of court. *Northern Illinois Coal and Iron Co. vs. Young*, 331.

10. LIMITATION.—Such a bill filed to set aside a decree on the ground of fraud, may be filed at any time within five years from the entering of the decree. *Id.*

11. CORPORATION—RIGHT TO FILE BILL.—Where the property sold under such decree belonged to a corporation the bill to set aside the decree may be filed by the corporation, and not necessarily by its receiver, or by his authority. *Id.*

12. PRACTICE—DISSOLUTION OF INJUNCTION.—If an injunction has been issued without notice to the defendant, he may make a motion to dissolve the injunction before filing his answer, and the court will consider the question of continuing the injunction as though it were a motion for an injunction where the defendant has notice and both parties are heard. *Metropolitan Grain & Stock Exchange vs. Mut. Union Tel. Co.*, 531.

13. INJUNCTION BONDS—AWARDING DAMAGES—SUIT ON BOND—FEDERAL PRACTICE.—Where upon a general order for an injunction bond in the Federal Court a bond was given in conformity to the state statutes and practice in the State Courts, conditioned to pay all damages and costs that shall be awarded against the complainants and in favor of the defendant, "upon the trial or final hearing of the cause, or upon the dissolution of the injunction," and no damages are awarded by the court upon the final hearing of the case and the dissolution of the injunction, no suit can be maintained upon the bond under the ruling of the United States Supreme Court in *Bein vs. Heath*. *Deakin vs. Lea*, 34.

14. SAME.—The fact that suit can be maintained upon a similar bond given in the State Court, under the state statutes, does not rule the practice in the Federal Court. *Id.*

15. DISSOLUTION OF INJUNCTION—INHERENT POWER OF CHANCERY COURT TO ASSESS DAMAGES.—A Court of Chancery has inherent power to assess damages upon the dissolution of an injunction; and where an injunction has been dissolved, the sounder and better rule is for the Court of Chancery to go on and assess the damages sustained by the party against whom the injunction issued. *Lea vs. Deakin*, 40.

POSTOFFICE EMPLOYE—*See* CRIMINAL LAW, 6.
PRACTICE.

1. EJECTMENT—RIGHT TO NEW TRIAL.—Where an action of ejectment was commenced against several defendants, but issue was had only on a separate complaint against one of them, and judgment was rendered against that one defendant for the land, and against all defendants for costs, only that defendant against whom the judgment for the land was rendered, his heirs, assigns and representatives are concluded by the judgment, or entitled to a new trial under the statute. *Forsythe vs. Van Winkle*, 106.
2. EQUITY PRACTICE—SERVICE OF NON-RESIDENT DEFENDANTS IN CHANCERY.—Under the Act of March 3, 1875, section 8, which provides a method for the service of non-resident defendants in certain chancery suits, it is not necessary that there shall be a marshal's return of "not found" in the district where the suit is brought, before the court can make the order directing the absent defendants to appear by a certain designated day. Such order may be made upon a proper showing by affidavit filed at the commencement of the suit. *Forsythe vs. Pierson*, 133.
3. RETURN DAY NEED NOT BE RULE DAY.—It is not necessary that the day designated for such non-resident defendants to appear and plead shall be a rule day. The court may fix upon any certain day to be set out in the order. *Id.*
4. SERVICE OF ORDER FOR APPEARANCE—BY WHOM MADE.—Such order is not a subpœna or process within the meaning of rule 15 or 17 which require that the service of all process shall be by the marshal of the district, or by his deputy, or by some one specially appointed by the court. The statute does not require any particular mode of service or proof of service. If it is made to appear that each of such defendants was actually served personally with a copy of such order, that is sufficient. *Id.*
5. SAME.—In this case, service of the order was made by the marshal, or his deputy, of the district where such defendant was a resident. *Id.*
6. EXCEPTIONS TO MASTER'S REPORT.—Where a reference is made to a master, which embraces questions of law as well as of fact, and after hearing the testimony and the arguments of counsel, the master prepares his report, it is not necessary to observe the formality of taking exceptions to the report before the master, prior to bringing the exceptions before the court. *Hatch vs. I. & S. R. R. Co.*, 138.
7. PARTY CANNOT INSIST UPON ARGUING EXCEPTIONS BEFORE MASTER.—It is not the practice in this circuit, for a master after hearing full arguments, to submit a draft of his report to the parties, in order for them to make objections thereto; and the parties have no legal

PRACTICE—*Continued.*

right to make objections to the draft of the report, and argue the same before the master. *Id.*

8. CONSTRUCTION OF EQUITY RULES.—The Supreme Court in adopting the Equity Rules, intended to dispense with the old formalities incident to settling the master's report and entering exceptions thereto. *Id.*

9. EQUITY PRACTICE.—An original bill in the nature of a bill of review for fraud may be filed as a matter of right, and without leave of court. *Northern Illinois Coal and Iron Co. vs. Young*, 331.

10. LIMITATION.—Such a bill filed to set aside a decree on the ground of fraud, may be filed at any time within five years from the entering of the decree. *Id.*

11. CORPORATION—RIGHT TO FILE BILL.—Where the property sold under such decree belonged to a corporation the bill to set aside the decree may be filed by the corporation, and not necessarily by its receiver, or by his authority. *Id.*

12. PRACTICE—DISSOLUTION OF INJUNCTION.—If an injunction has been issued without notice to the defendant, he may make a motion to dissolve the injunction before filing his answer, and the court will consider the question of continuing the injunction as though it were a motion for an injunction where the defendant has notice and both parties are heard. *Metropolitan Grain & Stock Exchange vs. Mut. Union Tel. Co.*, 531.

13. INJUNCTION BONDS—AWARDING DAMAGES—SUIT ON BOND—FEDERAL PRACTICE.—Where upon a general order for an injunction bond in the Federal Court a bond was given in conformity to the state statutes and practice in the State Courts, conditioned to pay all damages and costs that shall be awarded against the complainants and in favor of the defendant, "upon the trial or final hearing of the cause, or upon the dissolution of the injunction," and no damages are awarded by the court upon the final hearing of the case and the dissolution of the injunction, no suit can be maintained upon the bond under the ruling of the United States Supreme Court in *Bein vs. Heath. Deakin vs. Lea*, 34.

14. SAME.—The fact that suit can be maintained upon a similar bond given in the State Court, under the state statutes, does not rule the practice in the Federal Court. *Id.*

15. DISSOLUTION OF INJUNCTION—INHERENT POWER OF CHANCERY COURT TO ASSESS DAMAGES.—A Court of Chancery has inherent power to assess damages upon the dissolution of an injunction; and where an injunction has been dissolved, the sounder and better rule is for the Court of Chancery to go on and assess the damages sustained by the party against whom the injunction issued. *Lea vs. Deakin*, 40.

PRACTICE—*Continued.*

16. PRACTICE IN THIS, SEVENTH, CIRCUIT.—Such is the practice which will hereafter be adopted in this Circuit. *Id.*

17. CRIMINAL PRACTICE—COMMUNICATION BY JUDGE WITH JURY.—Though it is irregular and objectionable for a judge to answer privately by note, a communication from one of the jurors, while the jury are deliberating upon their verdict; yet a judgment will not be reversed upon this ground unless it appears that such action worked a prejudice to the accused. *Doyle vs. United States*, 100.

18. PRESENCE OF JURY WHEN SEALED VERDICT IS OPENED MUST BE SHOWN BY RECORD.—Where the accused consented that when the jury had agreed upon a verdict they might sign and seal the same, and if the court was not then in session hand it to the officer in charge of the jury to deliver to the clerk, and that the jury might then disperse to meet the court, when it should again convene, it was the right of the prisoner to have the jury present in court when the verdict was opened, and if the record does not show that they were so present, the judgment will be reversed for this reason. *Id.*

19. CIRCUIT COURT MAY ALTER SENTENCE.—Although the Circuit Court, upon writ of error, may affirm the rulings of the District Court in a criminal case, yet it is not obliged to impose the same sentence; and if it appear that the penalty inflicted by the District Court was not in conformity to law, the Circuit Court may award execution in accordance with its own opinion as to the degree of punishment warranted by the facts apparent upon the record. *Bates vs. United States*, 70.

20. WRIT OF ERROR IN CRIMINAL CASE—STAY OF PROCEEDINGS.—The Circuit Court will grant a writ of error to the District Court in a criminal case, and also allow a stay of proceedings, where the error complained of is a matter about which there may be a serious question, in order to allow the defendant to take the deliberate judgment of the appellate court upon the question involved in the case. *United States vs. Whittier*, 356.

21. GRANTING MOTION FOR NEW TRIAL—DISCRETIONARY.—A motion for a new trial before a District Court is addressed to the discretion of the court, and no error can be assigned for overruling it. *Ralph vs. United States*, 88.

PREFERENCE—*See* ASSIGNMENT FOR BENEFIT OF CREDITORS.

PRINCIPAL AND AGENT.

INSURANCE AGENTS—REVOCATION OF AGENCY.—When there is nothing in the original appointment of agents of an insurance company which binds the company to continue the agency for a specified time, the fact that the company in compliance with the Statute of Illinois, designated, from year to year, such persons as its agents on whom legal process may be served, does not imply any intention or agreement to continue the same persons as its agents during the ensu-

PRINCIPAL AND AGENT—*Continued.*

ing fiscal year, or for any special time; and such agency is revocable at will. *Davis vs. N. F. Ins. Co.*, 165.

PRIORITY OF CLAIMS DUE GOVERNMENT.

1. PRIORITY OF CLAIMS DUE GOVERNMENT MUST BE ASSERTED IN BANKRUPTCY BEFORE FINAL ADMINISTRATION.—If the United States Government hold a claim against a debtor in bankruptcy, and with knowledge of the proceedings in bankruptcy fails to prove its claim, or have it allowed in some form, it cannot assert any rights against the assignee or trustee, after the estate is fully administered and the fund distributed under orders of the court. *United States vs. Murphy*, 415.
2. WAIVER OF PRIORITY BY GOVERNMENT.—The failure of the Government to assert its right of priority to the funds in the Bankruptcy Court, is to be deemed a waiver of such right, for it can assert such right only in the manner allowed by the Bankruptcy Act. *Id.*
3. KNOWLEDGE OF CLAIM DOES NOT RENDER ASSIGNEE PERSONALLY LIABLE.—The fact that the assignee knew of the claim of the Government against his bankrupt and failed to retain funds enough to pay it, did not render him personally liable after final distribution of the assets, if the Government did not present such claim. *Id.*

PROBATE COURT—*See* PARTNERSHIP, 4—FEDERAL JURISDICTION, 2.

PROCESS—*See* SERVICE OF.

PROXIMATE CAUSE—*See* NEGLIGENCE, 17.

PROXY—*See* SUBSCRIPTION TO STOCK.

PUBLICATION—*See* JUDGMENTS AND DECREES, 2.

Inclosing an obscene, lewd or lascivious writing in a sealed envelope, and mailing it to another, constitutes a publication of the writing. *United States vs. Gaylord*, 438.

RAILROADS—*See* REDEMPTION, 1—ULTRA VIRES.

1. REORGANIZATION OF INSOLVENT RAILROAD CO.—PROVISION FOR UNSECURED CREDITORS, AND FOR STOCKHOLDERS.—A plan for the reorganization of an insolvent railroad company, which, among other things, provides that the holders of the unsecured indebtedness shall receive second preferred income bonds of the new company at par to the full amount of their respective debts and interest, and also provides that the stockholders of the old company shall receive stock of the new company in exchange at a certain ratio,—is not fraudulent and void as to the holders of the unsecured indebtedness. *Hancock vs. T., P. & W. R. R. Co.*, 148.
2. SAME—CONTRIBUTION OF EXPENSES.—The fact that if a holder of unsecured indebtedness avails himself of the reorganization he must contribute ratably to the necessary expenses, does not render such reorganization void. *Id.*
3. *Railroad Company vs. Howard*, 7 Wallace, 392, distinguished. *Id.*

RAILROADS—*Continued.*

4. LAND GRANTS—TRUSTEE—WASTE.—Where lands were granted to a certain railway in aid of construction, and upon foreclosure of a mortgage upon such railway the lands were transferred, under an arrangement, to another railroad company which issued certificates therefor entitling the holders to proportionate shares of the land after a certain time, such railroad company was a naked trustee for the purposes named, and not liable for not preventing trespasses and waste upon the lands while so held by it. *Beecher vs. C. & N. W. R'y Co.*, 246
5. But if the company participated in committing, or received the proceeds of the waste, it will be compelled to account therefor to the equitable owners. *Id.*
6. RAILROAD COMPANY MUST PROVIDE SAFE ROLLING STOCK—LIABILITY TO EMPLOYE.—Railroad Companies are bound to use due care in seeing that their cars and other rolling stock are maintained in a reasonably safe condition, and when an employé, in the proper discharge of his duty, is injured from the failure of the company to perform this personal duty, it is liable. *King vs. O. & M. R'y Co.*, 362.
7. CORPORATIONS are held to the same personal responsibility as natural persons, for the negligent acts of their agents or employés. *Id.*
8. NEGLIGENCE OF CAR INSPECTOR IS THAT OF THE COMPANY.—The negligence of the car inspector in failing to detect unsafe rolling stock, in case of injury to a brakeman resulting therefrom, is to be construed as the negligence of the railroad company, and not as that of a fellow-servant. *Id.*
9. BRAKEMEN MAY ASSUME THAT CARS ARE IN ORDER.—A brakeman on a railroad has a right to assume without inspection that the cars he is required to couple are in a proper state of repair for handling, and it is not negligence on his part to rush in between two cars to make the coupling without stopping to see if the bumpers are all right. *Id.*
10. PURCHASERS OF BONDS MUST TAKE NOTICE OF RIGHT TO CONSOLIDATE.—Persons who purchase bonds of a railway company while a statute is in force authorizing the consolidation of railroads, must be held to have contemplated at the time of the purchase of the bonds, that the railway issuing them, might consolidate with other railroad companies. *Tysen vs. Wabash R'y Co.*, 510.
11. CONSOLIDATION.—If several railroads consolidate, the consolidated company assumes the liabilities and succeeds to the rights of the constituent companies. *Id.*
12. A consolidated railroad company may execute a mortgage upon all the consolidated property which will be paramount to the unsecured indebtedness of the constituent companies. *Id.*
13. CREATION OF EQUITABLE LIEN BY CONSOLIDATION.—Where two

RAILROADS—*Continued.*

or more railroad companies consolidate, and part of the consideration for the transfer of the property of one of the roads to the consolidated company is the payment by it, of certain unsecured equipment bonds issued by that constituent company, which bonds the consolidated company agrees to "protect," the holders of the equipment bonds acquire thereby an equitable lien on the property of the consolidated company for the payment of their bonds. *Id.*

REAL ESTATE—*See* EMINENT DOMAIN.

RECEIVER—*See* NATIONAL BANKS, 2—BILL OF REVIEW, 3.

REDEMPTION.

1. FEES—COMMISSION TO CLERK ON REDEMPTION.—A rule of the Federal Court requiring a person redeeming from a foreclosure sale to pay, in addition to the amount required to effect redemption, a commission of one per cent. to the clerk, sustained. *Blair vs. Chicago & Pacific R. R. Co.*, 320.

2. EXECUTION SALE OF REAL ESTATE—RIGHT TO RENTS AND PROFITS DURING REDEMPTION PERIOD WHEN MORTGAGEE IS IN POSSESSION.—The statute of Indiana of March 31, 1879, relating to the redemption of real estate sold on execution or decree of sale, and providing that in case the same is not redeemed, the purchaser shall be entitled to recover from the parties in possession during the time the real estate is subject to redemption reasonable rents and profits therefor, does not apply to the case where a mortgagee has gone in possession prior to the lien of the judgment under which the sale is made, by agreement with the mortgagor, the judgment debtor. *Edwards vs. Wray*, 251.

RE-ISSUE PATENT—*See* PATENT LAW.

REMOVAL OF CAUSES.

1. AT WHAT TERM OF COURT SUIT CAN BE REMOVED.—A case cannot be removed to the Federal Court from the State Court after the first term of that court at which the cause was at issue and could have been heard or tried in conformity with the law and the practice of the court. *Kerting vs. American Oleograph Co.*, 81.

2. NOTICING CAUSE FOR TRIAL—FIRST TERM AT WHICH TRIAL COULD BE HAD.—Where the State Court holds a term each month, and cases are put upon the trial calendar only upon notice and motion of one of the parties when such cause is at issue, the fact that such case is not placed upon the trial calendar until several terms after it was at issue, will not give the right to remove after the first term at which such cause could have been tried. *Id.*

3. FILING REPLICATION NUNC PRO TUNC—SUPPLEMENTAL TRANSCRIPT.—Where a cause has been removed to the Federal Court and it does not appear by the transcript that any replication had been filed to the answer and that the cause was at issue, it is competent to

REMOVAL OF CAUSES—*Continued.*

show by a supplemental transcript that the State Court, subsequent to the filing of the original transcript, entered an order allowing a replication to be filed *nunc pro tunc* as of the date when it was claimed the replication had been originally filed. *Id.*

4. APT TIME.—Under the Act of 1875, a cause cannot be removed from the State to the Federal Court after the term at which it first could have been tried in the State Court. *Phœnix Mut. L. Ins. Co. vs. Walrath*, 432.
5. CAUSE CANNOT BE REMOVED AFTER ONE TRIAL IN STATE COURT, IF NEW TRIAL IS GRANTED.—Suits which have been commenced since the passage of that act cannot be removed after there has been one trial in the State Court; and the fact that the State Supreme Court reverses the judgment in the first trial, and remands the case for a new trial, and new issues are made in the case, does not give a right of removal after having been tried once. *Id.*
6. APT TIME.—Where it is attempted to remove a cause from a State Court to the Federal Court, it must affirmatively appear on the record or be shown by the petition, that the case could not have been heard or tried at a term of the State Court before the application for removal was made. *Aldridge vs. Crouch*, 180.
7. TERM AT WHICH CAUSE CAN BE REMOVED.—The construction of the statute is that, if at any term the case could be tried in conformity with the law and practice of the court, an application at a subsequent term will be too late. *Id.*
8. WHEN STATE COURT DOES NOT REACH CASE AT FIRST TERM.—The fact that the court proceeding in its regular order did not reach the case, on account of pressure of business, at the first term at which it was ready for trial will not give the parties the right to make application for removal at a subsequent term. *Id.*
9. STATUTE OF 1867—REMOVAL ON ACCOUNT OF PREJUDICE.—The statute of 1867 does not permit a citizen of a state in which a suit is brought, to make application for removal on account of prejudice. *Id.*
10. PRINCIPAL IN BOND.—The provision of the statute requiring the party who desires to remove a cause from the State to the Federal Court, to "make and file" a bond with the petition, does not require that the bond shall be *signed* by such party. It may be signed by a different person named therein as principal, and another as surety. *Public Grain & Stock Exchange vs. Western Union Tel. Co.*, 568.
11. TERM AT WHICH REMOVAL CAN BE HAD.—If, in consequence of the want of diligence on the part of the applicant for removal, the issue in the cause is not made up, or if, having the right to have the cause heard, or set down for hearing, he does not ask for it, it is too late at a subsequent term to take steps for removal. *Id.*

REMOVAL OF CAUSES—*Continued.*

12. ENTERING CAUSE IN FEDERAL COURT.—If a complete transcript of the record and papers in a cause in the State Court is transmitted to the clerk of the Federal Court and placed among the files in his office, in proper time, though not marked as filed, and proceedings are subsequently taken in the cause by both parties, the cause will be considered as fully entered in the Federal Court, although no formal motion to docket it was made. *Glover vs. Shepperd*, 572.

13. CITIZENSHIP AT TIME OF APPLICATION FOR REMOVAL, SUFFICIENT.—It is only necessary to show that the parties to the suit are citizens of different states at the time the application for removal is made; it need not be shown to have existed at the time of the commencement of the suit. *Id.*

14. FORM OF PETITION.—It is not sufficient in a petition for removal to describe the petitioners as *residents* of certain states, they must be described as *citizens*. *Id.*

15. AMENDMENT OF PETITION.—But in such case if the requisite citizenship actually exists, the Federal Court may allow the petition to be amended so as to show the facts necessary to bring the case within the Removal Act. *Id.*

16. WHEN ONE PARTY IS A FOREIGNER.—If a citizen of a foreign country brings suit in a State Court against a citizen of the state, the latter may remove the cause to the Federal Court under the first clause of section 2, of the Act of 1875. *Deakin vs. Lea*, 27.

17. But the last clause of section 2, of the Act of 1875, authorizes removal only in suits between citizens of different states, and does not apply to foreigners. *Id.*

18. REMANDING CAUSE—EFFECT OF ENTERING LIMITED APPEARANCE IN STATE COURT.—Where a subject of Great Britain brought suit in the State Court upon a joint and several bond, against a citizen of the state of Illinois and two others subjects of Great Britain; and the citizen of Illinois entered his general appearance in the State Court and the two defendants subjects of Great Britain, no service being had, entered their appearance by counsel, in the State Court, solely for the purpose of petitioning for a removal of the cause; and thereupon all three defendants did petition for removal, and removal was had, it was *held* that as the bond was executed in a suit in, and under the order of this court the Federal Court would retain jurisdiction, and would not remand the cause. *Id.*

19. WHEN CAUSE WILL BE REMANDED.—If a suit has been removed from the State to the Federal Court it will not be remanded unless it appears to the satisfaction of the court that it has no jurisdiction. *Id.*

20. DAMAGES ON INJUNCTION BOND—WHEN AWARDED.—Whether a suit can be maintained upon an injunction bond given in the Federal

REMOVAL OF CAUSES—*Continued.*

Court, under a general order of the court, conditioned "to pay all damages and costs that may be awarded * * * upon the dissolution of said injunction," when no damages were awarded by the court at the time of the dissolution, in the light of the statutes of Illinois and the decision of the United States Supreme Court in *Bein vs. Heath*—discussed but not decided. *Id.*

21. In such case however, if the State Court would be compelled under the statutes to sustain the suit, the Federal Court ought to be bound by the same rule. *Id.*

22. JURISDICTION OVER PERSON—APPEARANCE TO PETITION FOR REMOVAL IS GENERAL APPEARANCE.—If defendants who are not served with process in a suit in a State Court enter their appearance by counsel solely for the purpose of joining in a petition for removal to the Federal Court, "and for no other purpose whatsoever," as expressed, and the cause is removed to the Federal Court, such appearance so entered will, it seems, give the court jurisdiction over such defendants for all purposes the same as though process had been personally served upon them. *Deakin vs. Lea*, 34.

23. PARTIES TO CONTROVERSY.—Where a bill has been filed in a State Court attacking the validity of a trustee's sale under a deed of trust, and asking leave to redeem the property, the trustee is a necessary and not a formal party to the suit, and if the complainant and the trustee are residents of the same state, the mortgagee and the purchaser at the trustee's sale both citizens of a different state, cannot remove the suit to the Federal Court on the ground of citizenship. *Evans vs. Faxon*, 175.

24. PARTIES TO CONTROVERSY—WILLS.—If a will gives to the executors thereof a certain sum of money to be held in trust for a specific purpose, the executors are indispensable parties defendant in a suit to set aside the will; and such suit cannot be removed to the Federal Court regardless of their citizenship. *Price vs. Foreman*, 328.

25. CONTROVERSY—PARTIES TO SUIT.—Where the complainant, claiming title to certain real estate under one who has given a trust deed thereon, files a bill setting up that her title is superior to that of the trustee or the rights of the holder of the notes secured by the trust deed, the trustee is an indispensable party to the suit, and the holder of the notes cannot, on the ground of his own citizenship, remove the cause from the State to the Federal Court, the trustee being a citizen of the same state with the complainant. *Mitchell vs. Tillotson*, 325.

26. INCIDENTAL CONTROVERSY.—An incidental controversy which has arisen during the progress of long continued litigation in a State Court, but which did not exist at the time the suit was instituted there, does not entitle the parties thereto to remove the cause to the Federal Court on the ground of citizenship. *Ellis vs. Sisson*, 187.

REMOVAL OF CAUSES—*Continued.*

27. CONTROVERSY ARISING DURING LONG CONTINUED LITIGATION CANNOT BE REMOVED.—So where litigation had continued for twenty years in the State Court concerning the disposition of certain land, and parties then filed their petitions in the State Court, claiming that since the suit had commenced, they had made valuable improvements on the land for which they were entitled to a lien; it was *held*, that they could not remove the cause to the Federal Court. *Id.*

28. REMOVABLE CONTROVERSY BETWEEN PLAINTIFF AND EACH DEFENDANT IN ACTIONS OF TORT.—In an action of trespass brought in the State Court against several defendants, one of whom is a citizen of a different state from that of the plaintiff, and others are citizens of the same state with the plaintiff, if the citizen of a different state files a several plea, he can remove the cause to the Federal Court on the ground that there is a controversy in the case solely between him and the plaintiff. *Kerting vs. Cotzhausen*, 582.

29. WHOLE SUIT REMOVED.—In such case the removal will carry with it the entire suit. *Id.*

30. CONSTITUTIONAL QUESTIONS.—In order for a railroad company to remove a suit brought against it for extortion, from a State to the Federal Court, on the ground that a statute of the state impairs the validity of its charter in violation of the United States Constitution, it is not necessary to decide that the immunity claimed by the defendant can be sustained. If it appears that there is in the suit a *question* arising under the National Constitution, that is sufficient. *Illinois vs. C. B. & Q. R. R. Co.*, 584.

RENTS AND PROFITS—*See* MORTGAGES, 3.

REORGANIZATION—*See* RAILROADS, 1, 2.

RES JUDICATA—*See* PATENT LAW, 15—SUBSCRIPTION TO STOCK, 4.

FORMER DECREE IN ENGLAND.—A decree rendered by the Master of the Rolls in England, refusing an injunction and dismissing a bill in equity to restrain the infringement of an alleged trade mark, and which was not appealed from, is a complete bar to a suit brought in this country for the same purpose by the same complainants against the agent of the defendant in the English suit. *Lea vs. Deakin*, 23.

REVENUE LAW.

1. TRANSMISSION OF DUTIABLE ARTICLE BY MAIL—SMUGGLING.—The transmission of a dutiable article from a foreign country through the mails, but without any intent on the part of either sender or receiver to avoid the payment of duties thereon, does not constitute an act of smuggling. *Cotzhausen vs. Nazro*, 44.

SAME—SEIZURE OF ARTICLE—INTENT NOT CONSIDERED.—But under the detailed regulations for the execution of the General Postal Union treaty concluded at Berne, October 9, 1874, and under the

REVENUE LAW—*Continued.*

statutes of the United States, and the regulations of the Treasury and Post Office Departments, the transmission from a foreign country, by mail, of an article subject to duty, is unlawful, and renders the article liable to seizure by the collector of customs when in the hands of the person receiving it, though there be no intent on the part of either the receiver or the sender to avoid the payment of duties. The statute does not regard the intent so far as seizure of the article is concerned. *Id.*

8. CONSTRUCTION OF "MERCHANDISE."—The term "merchandise" as used in section 3082, of the Revised Statutes, providing for the unlawful importation of merchandise, is not limited to merchandise sent or received for sale, but includes any merchandise, even though intended as a gift from the sender to the receiver. *Id.*

RIPARIAN RIGHTS—*See* TITLE, 1, 4.

SALVAGE—*See* ADMIRALTY, 15–18.

SATISFACTION OF JUDGMENTS—*See* JUDGMENTS, 1.

SENTENCE—*See* PRACTICE, 19.

SERVICE OF PROCESS.

1. SERVICE OF NON-RESIDENT DEFENDANTS IN CHANCERY.—Under the Act of March 3, 1875, section 8, which provides a method for the service of non-resident defendants in certain chancery suits, it is not necessary that there shall be a marshal's return of "not found" in the district where the suit is brought, before the court can make the order, directing the absent defendants to appear by a certain designated day. Such order may be made upon a proper showing by affidavit filed at the commencement of the suit. *Forsythe vs. Pierson*, 133.

2. RETURN DAY NEED NOT BE RULE DAY.—It is not necessary that the day designated for such non-resident defendants to appear and plead shall be a rule day. The court may fix upon any certain day to be set out in the order. *Id.*

3. SERVICE OF ORDER FOR APPEARANCE—BY WHOM MADE.—Such order is not a subpœna or process within the meaning of rule 15 or 17 which requires that the service of all process shall be by the marshal of the district, or by his deputy, or by some one specially appointed by the court. The statute does not require any particular mode of service or proof of service. If it is made to appear that each of such defendants was actually served personally with a copy of such order, that is sufficient. *Id.*

4. SAME.—In this case, service of the order was made by the marshal, or his deputy, of the district where such defendant was a resident. *Id.*

5. NON-RESIDENT WITNESS PRIVILEGED FROM SUMMONS DURING ATTENDANCE.—While a resident of one state is attending the Federal Court in another state as a witness, in obedience to a subpœna, he

SERVICE OF PROCESS—*Continued.*
is privileged from service of summons in a civil action. *Atchison vs. Morris*, 191.

6. SAME.—The fact that there was no effort to influence the witness to come into the state with the view of having the summons served upon him, does not affect his privilege. *Id.*

7. SERVICE OF SUMMONS MAY BE SET ASIDE IN FEDERAL COURT AFTER REMOVAL FROM STATE COURT.—And if such witness is served with a summons from a State Court, the filing in that court of a petition and bond for removal to the Federal Court, is not such an appearance as will prevent him from objecting to the service when the case is removed to the Federal Court. *Id.*

8. CONCURRENT JURISDICTION—PRIORITY OF EXECUTION.—When executions issue from both the State and Federal Courts, the one under which a seizure is first made will prevail and hold the property, although the execution of the other may have been placed first in the hands of the officer. *Leopold vs. Godfrey*, 158.

9. LIEN OF LANDLORD.—A landlord has no lien upon the personal property of his tenant prior to the actual levy of his distress warrant. *Id.*

10. MARSHAL'S FEES PAYABLE IN ADVANCE.—The marshal has the right to demand the payment of fees for the service of process in advance. *Ray vs. Knowlton*, 360.

11. PROCESS MAY BE SERVED UPON FOREIGN INSURANCE COMPANY BY SERVICE UPON ANY AGENT.—A foreign insurance company doing an insurance business in the state of Illinois may be served with process of law by service upon any of its agents in accordance with section 5 of the Practice Act, and it is not necessary that the service be had upon the agent designated by the company, in pursuance of section 22, chapter 23 of the Illinois Revised Statutes, as a person upon whom process may be served. *Johnson vs. Hanover F. Ins. Co.*, 452.

12. The statute requiring foreign insurance companies to appoint an agent upon whom process might be served did not contemplate that service could be had upon no other agent than the one so designated. *Id.*

13. LOCAL AGENT MAY BE SERVED WITH PROCESS FOR THE COMPANY.—A local agent of an insurance company who obtains risks for the company may be served with process in the name of the company as an agent of the company. *Id.*

SLEEPING CAR COMPANIES—*See* TAXATION.

SHAREHOLDERS, LIABILITY OF—*See* NATIONAL BANKS—STOCKHOLDERS, LIABILITY OF.

SMUGGLING—*See* REVENUE LAW, 1.

SPARK ARRESTER—*See* NEGLIGENCE, 6.

SPIRITUALISM—*See* WILLS, 6.

SPREADING FIRES—*See* NEGLIGENCE, 17, 18.
STATUTE OF LIMITATIONS.

1. RECOVERY OF LANDS SOLD FOR TAXES—EQUITY JURISDICTION.—The statute of Indiana having provided that no action for the recovery of real property sold for taxes, shall lie unless brought within five years from such sale, a bill in equity cannot be maintained after the lapse of five years from a tax sale, to set aside the sale and quiet title to the land, although during a portion of the five years a decree was in force, (which was rendered by default against the complainant in this second suit and on its motion was subsequently set aside,) declaring and quieting the title to such lands in the defendants to such bill. *U. M. Life Ins. Co. vs Dice*, 378.
2. CONSTRUCTION OF ILLINOIS STATUTES.—Section 18 of chapter on Limitations, Revised Statutes of Illinois, which provides that the time of the absence of a debtor from the state shall not be considered part of the time limited for commencing an action against him, is modified by section 20 of the same chapter which provides that if an action cannot be maintained in the state where it arose, by reason of the lapse of time, then it cannot be maintained in Illinois. *Osgood vs. Artt*, 160.
3. WHEN AN ACTION IN ONE STATE WILL BE BARRED BY STATUTE OF LIMITATIONS IN ANOTHER.—And where the maker of a note was residing in Illinois when the note became due, and afterwards moved to Missouri and resided there for the period fixed by the statutes of that state as a bar to an action upon such note, and subsequently returned to Illinois, it was *held*, in an action brought in Illinois upon the note, that section 20, above, applied and not section 18, and that the action was barred in that state, by being barred in Missouri. *Id.*

STAY OF PROCEEDINGS—*See* CRIMINAL LAW, 5.
STOCKHOLDERS, LIABILITY OF—*See* NATIONAL BANKS.

1. CORPORATIONS—INSURANCE COMPANIES—REDUCTION OF STOCK—ISSUING PAID UP STOCK FOR PARTLY PAID STOCK.—Where the stock of an insurance company has not been fully paid up and the stockholders reduce the amount of the capital stock of the company, and full paid stock is issued to take up the partly paid stock at a certain proportion of the face thereof, the reduction of the stock does not relieve those who are stockholders at the time from their liability on the contracts then existing against the company, but the stockholders to whom full paid stock is issued, would not be liable individually on contracts made after the date of the reduction of the capital stock. *In re State Insurance Co.*, 301.
2. BANKRUPTCY—LIABILITY OF SHAREHOLDERS TO PAY IN FULL CLAIMS EXISTING AT TIME OF REDUCTION OF CAPITAL STOCK—RIGHTS OF SUBSEQUENT CREDITORS.—In such a case if the company becomes a bankrupt, and the assignee pays out of the general assets a 40

STOCKHOLDERS, LIABILITY OF—*Continued.*

per cent. dividend to all creditors alike, and the remaining general assets are not sufficient to pay the valid claims arising subsequent to the reduction of the capital stock, the shareholders of the date of the reduction are liable to the full extent of the claims existing prior to the reduction; and the fact that a 40 per cent. dividend has been paid to their especial creditors out of the general assets of the company, will not to that extent relieve them from their full liability, but they will be required to restore to the general fund such sum as had been paid from it to their special creditors, and which was needed to pay in full the claims of the subsequent creditors. *Id.*

SUBSCRIPTION TO STOCK.

1. CORPORATIONS.—In order to hold a person liable as a subscriber to stock in a stock company, it must be shown that he subscribed a contract to take stock in the company, or authorized some one to subscribe such contract for him, or that with knowledge that a subscription had been made in his name, he ratified the act. *McClelland vs. Whiteley*, 444.
2. Entering one's name in the personal memorandum book of the president of a stock company with the amount and number of shares which he orally agrees to take upon a certain contingency, which book at the time had nothing about it to show that it was to contain a list of stock subscribers—cannot be construed as a subscription for stock. *Id.*
3. EXECUTING PROXY NOT NECESSARILY RATIFICATION OF SUBSCRIPTION BY ANOTHER.—And if such person subsequently, at the request of the president, signs a proxy authorizing the president to vote for him the same number of votes as he would be entitled to if personally present, no particular meeting being specified and no stock having been actually issued, this would not be a ratification of the president's act in placing such person's name on the subscription books of the company, if, in fact, such act was unknown to him at the time. *Id.*
4. SERVICE OF PROCESS—RES JUDICATA.—A person sued on a stock subscription by a receiver appointed in proceedings to which he was only brought in by publication, is not bound by the decrees in such proceeding affecting his liability, and may defend on the merits. *Id.*

SUMMONS—*See* SERVICE OF PROCESS.

SURETIES—*See* ADMIRALTY, 12, 13.

SWAMP LAND ACT, CONVEYANCES UNDER—*See* TITLE.

TAX TITLES—*See* STATUTE OF LIMITATIONS, 1.

1. DECLARING TAX DEED VOID—EQUITABLE CONDITIONS.—Where a party comes into a court of equity seeking to have a tax deed set aside as a cloud upon his title, the court will require as a condition

TAX TITLES—*Continued.*

of declaring the tax deed void, that the complainant pay the amount necessary to redeem the premises at the time the redemption expired, with interest, and all subsequent taxes paid by the holder of the tax deed. *Smith vs. Gage*, 217.

2. JUDGMENT CONCLUSIVE AS TO VALIDITY OF TAXES.—A judgment for taxes rendered by the proper court, when it is attacked collaterally, is conclusive as to the validity of the taxes; and the owner of lands who has allowed judgment for taxes to go by default, cannot afterwards in a suit to set aside the tax sale, be heard to allege that a portion of the taxes for which judgment was rendered were illegal and invalid. *Chicago Theological Seminary vs. Gage*, 289.

TAXATION.

1. ONE STATE CANNOT TAX MONEY IN ANOTHER STATE.—The state of Indiana cannot tax that portion of the gross receipts of an Illinois corporation in its treasury in Illinois, which was earned in doing business in Indiana. The taxing power cannot be exercised on persons and property beyond the territory or jurisdiction of the state. *Indiana vs. Pullman Palace Car Co.*, 561.

2. INTER-STATE COMMERCE—TAXATION BY STATE OF SLEEPING CAR COMPANIES.—The transportation of passengers from one state to another in sleeping cars is inter-state commerce and cannot be regulated or taxed by a state. *Id.*

3. SAME—CONSTITUTIONAL LAW.—Section 87 of the act of the Legislature of Indiana of March 29, 1881, entitled "An act concerning taxation" which provides a two per cent. tax on the gross receipts of every foreign sleeping car company which are earned by doing business within the limits of that state, is unconstitutional and void. *Id.*

TELEGRAPH COMPANIES.

1. TELEGRAPH LINES—RIGHT OF MAYOR OF CITY TO CUT—MUNICIPAL CORPORATIONS.—Where a telegraph company erects poles and strings wires thereon within the limits of a city under the authority of an ordinance of the city council, wherein it is provided that the line of poles and wires shall be of a temporary character only, and that all rights and privileges granted by the ordinance shall expire on a certain day named therein, the mayor of the city has no right of his own motion to proceed to cut and remove the wires after the expiration of the time limited in the ordinance, and he is liable as a trespasser if he does so. *Mutual Union Telegraph Co. vs. Chicago*, 539.

2. INJUNCTION WILL NOT BE GRANTED TO ALLOW WIRES TO BE REPLACED.—But in such case if the mayor has actually gone on and cut and removed the wires an injunction will not be granted to restrain the city authorities from interfering with the company in

TELEGRAPH COMPANIES—*Continued.*
replacing such wires, because under the ordinance it has no right to maintain them. *Id.*
3. CITY CAN REGULATE CONSTRUCTION OF TELEGRAPH LINES.—A city has the right to determine in what manner and upon what conditions a telegraph company may enter the city and pass through it. *Id.*
4. RIGHT OF CITY TO REMOVE TELEGRAPH POLES AND WIRES.—It is competent for the authorities of a city, unless it is bound by an absolute contract permitting telegraph poles and wires to stand where they are, to take reasonable measures to have the same removed. *Id.*
5. NOT BOUND TO FURNISH MARKET REPORTS.—It is no part of the corporate duty or business of a telegraph company to collect and send out market reports, and though it voluntarily contracts to furnish such information, it may terminate such contract, and it cannot be compelled to enter into another. ***Metropolitan Grain and Stock Exchange vs. Mut. Union Tel. Co.***, 531.
TITLE—*See* EMINENT DOMAIN.
1. CONVEYANCES UNDER SWAMP LAND ACT—TITLE TO BED OF UNSURVEYED LAKE.—The Federal Government ceded to the state of Indiana under the Swamp Land Act of 1850, all the lots on Government subdivisions surrounding Beaver Lake, in that state, the lake being non-navigable and having never been surveyed, nor the bed offered for sale. The state having assumed the duty and obligation of draining the lands acquired by the grant, by the acceptance thereof, *held*, that the conveyance of all the lands surrounding the lake passed the title to the bed of the lake from the Government to the state. ***State of Indiana vs. Milk***, 197.
2. CONVEYANCE BY THE STATE TO CITIZEN—TITLE TO NON-NAVIGABLE LAKE—RIPARIAN RIGHTS.—But when the state conveyed to private parties the tracts surrounding the lake, the title to the bed of the lake did not pass from the state to the grantees as riparian proprietors. *Id.*
3. TITLE TO BED OF LAKES AND PONDS.—Mere proprietorship of the surrounding lands will not, in all cases, give ownership to the beds of natural non-navigable lakes and ponds, regardless of their size. Each case depends largely upon its own facts. *Id.*
4. GRANT OF LAND ON LAKE EXTENDS ONLY TO EDGE.—While a general grant of land on a non-navigable river or stream extends the line of the grantee to the middle or thread of the current, a grant to a natural pond or lake, extends only to the water's edge. *Id.*
5. CONVEYANCE BY STATE—TITLE—ESTOPPEL.—Where the state conveyed all the land surrounding a lake to private parties, making no express reservation of the bed of the lake, and the grantees, claiming title to the bed, laid out large sums of money in draining

TITLE—*Continued.*

the lake, and subdivided and platted the bed, and subsequently the state derived title to a portion of the lots of such subdivision from such grantees, through *mesne* conveyances, and sold them out describing them according to the subdivision and plat, and levied taxes upon all the lots of the subdivision, *held*, that the state was estopped to set up title to lots derived by the defendants through the original grantees, although the state had never actually conveyed the title to the land embraced in such lots. *Id.*

6. Where land is donated to a railroad company, and the title is fraudulently taken by the officers of the company to themselves, the railroad company cannot maintain a suit to acquire the title if by its own charter, it is forbidden to take and hold the lands. *Farmers' Loan & Trust Co. vs, G. B. & M. R. R. Co.*, 334.

TOLLS—*See* NAVIGATION OF RIVERS.

TRADE MARKS.

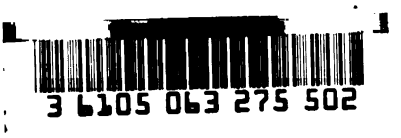
1. "WORCESTERSHIRE SAUCE" IS A GENERIC TERM.—The term "Worcestershire Sauce" has become generic as applied to a certain kind of table sauce, and cannot be exclusively appropriated by the complainants simply because they reside in Worcestershire, England. *Lea vs. Deakin*, 28.
2. RES JUDICATA—FORMER DECREE IN ENGLAND.—A decree rendered by the Master of the Rolls in England, refusing an injunction and dismissing a bill in equity to restrain the infringement of an alleged trade mark, and which was not appealed from, is a complete bar to a suit brought in this country for the same purpose by the same complainants against the agent of the defendant in the English suit. *Id.*
3. AUTHOR'S RIGHTS—NOM DE PLUME—PUBLICATION WITHOUT COPYRIGHT—NO TRADE MARK IN AUTHOR'S ASSUMED NAME.—An author or writer cannot acquire any better or higher right in a *nom de plume*, or assumed name, than he has in his Christian or baptismal name, and he cannot have a trade mark in his *nom de plume*, so as to prevent the application of the rule that the publication of a literary product without copyright is a dedication to the public after which any one may republish it, and in connection with the author's name. *Clemens vs. Belford*, 459.
4. AUTHOR'S NOM DE PLUME CANNOT BE SIGNED TO MATTER WHICH HE DID NOT WRITE.—An author who is known to the public under a *nom de plume* has the right to prevent the publication of matter which he did not write, in connection with his *nom de plume* and purporting to be written by him. *Id.*
5. RIGHT TO PUBLISH UNCOPYRIGHTED PRODUCTION.—Any person can publish any uncopyrighted production, and give the author's name on the title page or elsewhere as he chooses. *Id.*
6. The *nom de plume* "Mark Twain" is not a trade mark. *Id.*

TRESPASS—*See* TELEGRAPH COMPANIES, 1.
TRUSTS.
1. SUBSEQUENT DESIGNATION OF, VALID.—If a conveyance is made to a trustee upon trusts thereafter to be declared or designated by the grantor, and the trustee accepts the designation so made by the grantor, the trustee is bound by such declaration and designation as completely as if the deed and declaration of trust were simultaneous and part of one and the same transaction. *Ireland vs. Geraghty*, 465.
2. SUFFICIENCY OF DECLARATION OF TRUST.—A trust is definite enough to be valid if there is sufficient certainty in the terms of the declaration of trust to enable a court of equity (in case the trustee should neglect or refuse to execute the trust,) to take possession of the trust through its own trustee or receiver, and execute the trust, and carry out the wishes and intentions of the donor. *Id.*
3. A trust "for the purpose of providing an agricultural home for poor boys, in connection with an industrial school," is sufficiently definite to be valid. *Id.*
4. CREATION OF TRUST—WHEN CONVEYANCE COMPLETED—RE-DELIVERY OF SECURITIES.—Where the grantor in a deed of trust delivered to the trustee all his credits and personal securities so indorsed and transferred as to enable the latter to exercise absolute control and ownership over them, the fact that such securities were subsequently returned to the grantor at his request, and that he retained possession of them until his death, attending to the business connected with them, but not claiming ownership over them, would not operate to deprive the original trust conveyance of its validity, even though the deed of trust was not recorded during the lifetime of the grantor. *Id.*
UNDUE INFLUENCE—*See* WILLS, 6.
ULTRA VIRES.
1. CORPORATIONS—NEGLIGENCE.—When damage is done to real estate held by a corporation, the party by whose negligence such injury was caused cannot escape responsibility by showing that the corporation was not permitted by its charter to acquire title to the property, or that it acquired it for purposes unauthorized by law. *Farmers' Loan & Trust Co. vs. Green Bay & Minnesota R. R. Co.*, 334.
2. TITLE—FRAUD.—Where land is donated to a railroad company, and the title is fraudulently taken by the officers of the company to themselves, the railroad company cannot maintain a suit to acquire the title if by its own charter, it is forbidden to take and hold the lands. *Id.*
VERDICT—*See* PRACTICE, 18.
WAGER CONTRACTS—*See* BOARD OF TRADE.
WAREHOUSES—*See* INSURANCE LAW, 2.

WASTE—*See* LAND GRANTS.
WATERS AND WATER COURSES—*See* NAVIGATION OF RIVERS.
WILLS—*See* PARTIES TO SUIT, 2.

1. SECONDARY EVIDENCE ADMISSIBLE TO ESTABLISH LOST WILL—DECLARATIONS OF TESTATOR.—In a suit to establish a lost will secondary evidence of the existence and contents of the will is admissible; and the declarations of the testator concerning the will may be shown, as well to establish its contents, as to show the probability or improbability of its destruction by him. *Southworth vs. Adams*, 256.
2. CHARACTER OF EVIDENCE NECESSARY.—The burden is on a party setting up a lost will, to prove its execution and contents by strong, positive and convincing evidence. *Id.*
3. LOST WILL—PRESUMPTION OF DESTRUCTION BY TESTATOR.—Where it is proved that a will was made, and the testator thereafter had custody of it, if it cannot be found after his death the presumption is that he destroyed it *animo cancellandi*, but such presumption is not conclusive and may be rebutted and overthrown by circumstantial proof. *Id.*
4. EVIDENCE—WEIGHT OF TESTIMONY.—To justify a settled belief that the statements of a witness are willfully fabricated, the court should not rest its judgment upon possibilities, but there should be strong circumstances and tangible facts plainly pointing to such a conclusion. *Id.*
5. The court after a full and exhaustive review of the extended facts and circumstances of this case, holds that the testator did not destroy his will *animo cancellandi*, but that it was accidentally lost from his possession shortly before his death, and should be established. *Id.*
6. UNDUE INFLUENCE OF SPIRITUALISM.—Where a person in a weakened state of mind embraced spiritualism and came under the influence of a spirit medium and was thereby alienated from his only son and child, and willed his property to the medium, disinheriting his child: *held*, that the will made under such circumstances was invalid and would be set aside. *Thompson vs. Hawks*, 440.

WITNESS—*See* SERVICE OF PROCESS, 4–6.
WORCESTERSHIRE SAUCE—*See* TRADE MARKS, 1.
WRIT OF ERROR—*See* CRIMINAL LAW, 5—PRACTICE, 20


3 6105 063 275 502

3 6105 063 275 502